Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ROBERTSON, STEPHENS & COMPANY,
Petitioner,

v.

TONYJA DUFFIELD,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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135 pp

QUESTION PRESENTED

Whether by enacting the Civil Rights Act of 1991, which states that "[w]here appropriate and to the extent authorized by law, . . . arbitration is encouraged to resolve disputes arising under [the federal statutes amended by this title]," Congress intended, contrary to this Court's ruling in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), to preclude arbitration of Title VII and state statutory antidiscrimination claims pursuant to individual arbitration agreements entered into as a condition of employment.

PARTIES

All parties appear in the caption of the case on the cover page.

While the action below was pending, petitioner Robertson, Stephens & Co., through a merger, became BancAmerica Robertson Stephens. Pursuant to Rule 29.6 of the Rules of this Court, petitioner BancAmerica Robertson Stephens states it is a wholly owned subsidiary of BankAmerica Corporation. BankAmerica Corporation has recently entered into an agreement to sell certain assets of BancAmerica Robertson Stephens, specifically the Robertson Stephens Division, to BankBoston Corporation in a stock sale. Upon completion of the sale on or about August 31, 1998, petitioner shall become a wholly owned subsidiary of BankBoston Corporation and shall be known as BancBoston Robertson Stephens. For convenience's sake, however, the caption and text of this petition refer to petitioner as Robertson, Stephens & Co.

BankBoston Corporation has neither a parent corporation nor any subsidiary which is nonwholly owned or publicly traded.

BankAmerica Corporation does not have a parent corporation. BankAmerica Corporation has the following corporate subsidiaries or affiliates which are not wholly owned, including those that are or may be publicly held: BA Merchant Services, Inc.; BankAmerica Capital I; BankAmerica Capital II; BankAmerica Capital III; BankAmerica Capital IV; BankAmerica Institutional Capital A; BankAmerica Institutional Capital B; KorAm Bank; BA Lepanto (Philippines); Hong Kong and

Shanghai Insurance Co. Ltd.; AArnBank Singapore; Inchroy Credit Corporation Ltd.; Foppingadreef Investments; Debt Recovery Ltd.; 693327 Ontario Limited; Advanced Quick Circuits, Inc.; Advanced Quick Circuits, L.P.; AMB Investment Real Estate, L.P.; Annapolis Apartments Limited Partnership; Arrowhead LLC; Asia Port Investors LLC; BA Rescarven Holding Company; BA Savings Bank; Bay 2 Bay Leasing LLC; Bel/Boy Limited Partnership; BJ Services Trust 1997-1; Broadway Pointe Venture, LLC; California Equity Fund 1991 Limited Partnership; California Equity Fund 1993 Limited Partnership; Colony Petroleum, L.L.C.; Concorde Solutions, Inc.; Crossover Investment Management, L.L.C.; Custom Acquisition Corporation; Custom Industries, L.P.; DFO Partnership; Discovery View Associates Limited Partnership; Duo-Tang, Inc.; Golden West/Henry Building Limited Partnership; Home Technology Healthcare, Inc.; LATCH Easternwood Limited Partnership; LNS Group, Inc.; Maguire Partners-Glendale Center, L.L.C.; MCG Northwest, Inc.; New Homes for North Kenwood-Oakland Limited Partnership; PBS Building Systems, Inc.; Phaestos FSC, Inc.; Plastic Engineered Components, Inc.; Port Orchard First Limited Partnership; Railcar Associates, L.P.; RS & Co. Environmental Partners, L.P.; RS & Co. Venture Partners IV, L.P.; RSRF Ranch Company, LLC; SABA Medical, Inc.; SABA Medical, L.P.; Sardonyx Shipping Pte Ltd.; Stamford Associates; Tiryns FSC, Inc.; Titusville Station Associates Limited Partnership; and Vine Court Limited Partnership.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES	ii
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	1
STATEMENT OF THE CASE	2
A. Duffield's Employment With Robertson, Stephens	3
B. Duffield's Complaint	4
C. The District Court's Orders	5
D. The Court of Appeals' Decision	5
1. The text of Section 118	6
2. The legislative history of Section 118	7
3. The purpose of the Civil Rights Act of 1991	8

REASONS FOR GRANTING THE PETITION .. 9

I. THE DECISION BELOW CONFLICTS WITH THE DECISION OF EVERY OTHER CIRCUIT COURT THAT HAS ADDRESSED THIS ISSUE 9

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S ARBITRATION CASES AND IS IN ERROR 13

A. The Ninth Circuit Failed to Follow *Gilmer* 13

B. The Ninth Circuit Decision in *Duffield* Is in Error 17

1. The 1991 Civil Rights Act Promotes, Rather Than Precludes, the Use of Arbitration to Resolve Disputes Under the Act 17

a. Section 118 "encourage[s]" arbitration 17

b. The legislative history of Section 118 does not evince congressional intent to preclude arbitration 21

c. Arbitration is consistent with the purpose of the 1991 Civil Rights Act 23

2. No Support Exists for the Ninth Circuit's Conclusion that Congress Evinced its Intent to Preclude Arbitration of State Statutory Antidiscrimination Claims 23

III. THE COURT SHOULD RESOLVE THIS CIRCUIT SPLIT BECAUSE IT IS VITALLY IMPORTANT TO EMPLOYERS, EMPLOYEES, AND COURTS NATIONWIDE 25

A. This Question Significantly Affects Employers and Employees Throughout the Country 25

B. The Ninth Circuit's Treatment of State Discrimination Claims Has Equally Broad Effect 28

C. Courts and Practitioners Are Actively Litigating This Question and Closely Tracking This Case 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page

Cases

Alexander v. Gardner-Denver Co.,
415 U.S. 36 (1974) 6, 7, 14

Alford v. Dean Witter Reynolds, Inc.,
905 F.2d 104 (5th Cir. 1990) 20

Alford v. Dean Witter Reynolds, Inc.,
939 F.2d 229 (5th Cir. 1991) 13, 20

Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875 (4th Cir.), *cert. denied*, 117 S. Ct. 432 (1996) 10, 11, 21

Bender v. A.G. Edwards & Sons,
971 F.2d 698 (11th Cir. 1992) 13

Benefits Communications v. Klieforth,
642 A.2d 1299 (D.C. 1994) 11

Bercovitch v. Baldwin School, Inc.,
133 F.3d 141 (1st Cir. 1998) 12

Brookwood v. Bank of America,
45 Cal. App. 4th 1667 (1996) 24

Cole v. Burns International Security Services, 105 F.3d 1465 (D.C. Cir. 1997) 11

Dean Witter Reynolds, Inc. v. Alford,
500 U.S. 930 (1991) 20

EEOC v. Arabian American Oil Co.,
499 U.S. 244 (1991) 19

EEOC v. Frank's Nursery & Crafts, Inc., 966 F. Supp. 500 (E.D. Mich. 1997) 12

Faragher v. City of Boca Raton,
118 S. Ct. 2275, 1998 WL 336322
(U.S. June 26, 1998) 18

Fletcher v. Kidder, Peabody & Co.,
619 N.E.2d 998 (N.Y.), *cert. denied*,
114 S. Ct. 554 (1993) 12, 24

Garcia v. United States,
469 U.S. 70 (1984) 22

Gilmer v. Interstate/Johnson Lane Corp.,
500 U.S. 20 (1991) . . . . . *passim*

Goodyear Atomic Corp. v. Miller,
486 U.S. 174 (1988) 19

Higgins v. Superior Court,
234 Cal. App. 3d 1464 (1991) 20

Joyner v. Monier Roof Tile, Inc.,
784 F. Supp. 872 (S.D. Fla. 1992) 16

Kaliden v. Shearson Lehman Hutton, Inc.,
789 F. Supp. 179 (W.D. Pa. 1991) 20

Kremer v. Chemical Constr. Corp.,
456 U.S. 461 (1982) 24

Lorillard v. Pons,
434 U.S. 575 (1978) 16

Mago v. Shearson Lehman Hutton, Inc.,
956 F.2d 932 (9th Cir. 1992) 13, 16

Matthews v. Rollins Hudig Hall Co.,
72 F.3d 50 (7th Cir. 1995) 11

Metz v. Merrill Lynch, Pierce, Fenner & Smith, 39 F.3d 1482 (10th Cir. 1994) 13

Miller v. Public Storage Mgmt., Inc.,
121 F.3d 215 (5th Cir. 1997) 12

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,
473 U.S. 614 (1985) 14, 15

Mouton v. Metropolitan Life Insurance Co., __ F.3d __,
1998 WL 396827 (5th Cir. July 31, 1998) 10

Nelsen v. Colleary,
574 N.Y.S.2d 912 (N.Y. Sup. 1991) 20

Nghiem v. NEC Electronic, Inc.,
25 F.3d 1437 (9th Cir. 1994) 13

Oscar Mayer & Co. v. Evans,
441 U.S. 750 (1979) 16

Patterson v. Tenet Healthcare, Inc.,
113 F.3d 832 (8th Cir. 1997) 11

Prudential Insurance Co. v. Lai,
42 F.3d 1299 (9th Cir. 1994),
cert. denied, 116 S. Ct. 61 (1995) 6, 8, 28

Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) 14

Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
995 F. Supp. 190, 1991 WL 81907
(D. Mass. Jan. 26, 1998) 12

Salgado v. Atlantic Richfield,
823 F.2d 1322 (9th Cir. 1987) 24

Salinas v. United States,
118 S. Ct. 469 (1997) 21

Seus v. John Nuveen & Co.,
___ F.3d ___, No. 97-1498, 1998
WL 294020 (3d Cir. June 8, 1998) ... 2, 9, 18, 21, 28

Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) 14

Thompson v. Thompson,
484 U.S. 174 (1988) 21

West Virginia University Hospitals, Inc. v. Casey, 499 U.S. 83 (1991) 19

Willis v. Dean Witter Reynolds, Inc.,
948 F.2d 305 (6th Cir. 1991) 13, 21

Winkler v. Pacific Brokerage Servs., Inc.,
No. 97 C 7340, 1998 WL 341622
(N.D. Ill. June 19, 1998) 28

Wright v. Universal Maritime
Service Corp., 118 S. Ct. 1162 (1998) 2

Statutes

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 1

28 U.S.C. § 1343 1

28 U.S.C. § 1292(b) 5

28 U.S.C. § 1367 1

42 U.S.C. § 1981 6

Age Discrimination in
Employment Act of 1967,
29 U.S.C. §§ 621 *et seq.* 9, 11, 13, 16

Americans with Disabilities Act,
42 U.S.C. § 12212 12

California Fair Employment and
Housing Act, Cal. Gov't Code
§§ 12900-12996 ..... 4, 8, 20, 23, 24, 28

Civil Rights Act of 1991,
Pub. L. 102-166 ..... *passim*

Civil Rights Act of 1991,
Pub. L. 102-166, § 118 ..... *passim*

Declaratory Judgment Act,
28 U.S.C. §§ 2201-2202 4

Federal Arbitration Act,
9 U.S.C. §§ 1 *et seq.* ..... *passim*

Title VII, 42 U.S.C.
§§ 2000e *et seq.* ..... *passim*

Other Authorities

8A Lab. Rel. Rep. (BNA) ¶ 451:1 (1995) 28

63 Fed. Reg. 35299 (June 29, 1998)
(SEC Release No. 34-40109) 29

137 Cong. Rec. H3950
(daily ed. June 5, 1991) 19

137 Cong. Rec. H9505
(daily ed. Nov. 7, 1991) 22

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(daily ed. Oct. 30, 1991) 22

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Judicial Business of the United States Courts: 1997 Report of the Director (1998) 26

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Federal Rule of Civil Procedure 23(e) 18

Henry Weinstein, "Decision Frees Workers from Mandatory Arbitration Rule; Labor: the Appeals Court Action, Allowing a Woman to Pursue Bias Claim in a Lawsuit, Could Affect Millions," *Los Angeles Times* at D1 (May 12, 1998) 30

Judicial Conference of the United States, *Long Range Plan for the Federal Courts* (1995) . . . 26

NYSE Rule 347 3

Standard & Poor's Security Dealers of North America (1998) 26

U.S. General Accounting Office, *Alternative Dispute Resolution: Employers' Experiences With ADR in the Workplace* (GAO/GGD-97-157) 25, 26, 27

U.S. General Accounting Office,
Employment Discrimination: Most Private-Sector Employers use Alternative Dispute Resolution 7 (GAO/HEHS-95-150) 25

Petitioner respectfully submits that a writ of *certiorari* should issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 144 F.3d 1182, 76 Fair Empl. Prac. Cas. (BNA) 1450, Fed. Sec. L. Rep. ¶ 90,202, and is reprinted in Appendix A hereto at 1a-56a. The district court's opinion of August 26, 1996, denying respondent's motion for partial summary judgment, is not reported and is reprinted in Appendix B at 57a-71a. The district court's opinion of March 13, 1997, granting petitioner's motion to compel arbitration and certifying the orders for interlocutory appeal, is not reported and is reprinted in Appendix C at 72a-87a. The court of appeals' order of April 21, 1997, granting permission to appeal pursuant to 28 U.S.C. § 1292(b), is reprinted in Appendix D at 88a.

JURISDICTION

The court of appeals' opinion was filed on May 8, 1998. This petition is being timely filed within 90 days of that opinion. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Respondent first invoked federal court jurisdiction in the case under 28 U.S.C. §§ 1331, 1343, and 1367.

STATUTES INVOLVED

The following statutes are involved in this case: the Civil Rights Act of 1991, Pub. L. 102-166, and the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* The pertinent text of these statutes is set forth in Appendix E at 89a-90a.

STATEMENT OF THE CASE

By holding that arbitration agreements entered into as a condition of employment are not enforceable with respect to Title VII and state antidiscrimination statutory claims, the Ninth Circuit invalidated significant portions of arbitration agreements that are the norm in the securities industry and commonplace in many others. The Ninth Circuit's decision effectively rejects this Court's holding in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), and is in conflict with the decision of every other circuit court that has addressed the issue, including the recent Third Circuit decision in *Seus v. John Nuveen & Co.*, __ F.3d __, No. 97-1498, 1998 WL 294020 (3d Cir. June 8, 1998). The decision below raises one of the most important and often litigated issues in the field of employment law today: whether employers and individual employees may agree as a condition of employment to arbitrate state and federal discrimination claims. Further guidance from the Court on the application of the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* ("FAA"), to statutory discrimination claims, seven years after the decision in *Gilmer*, is essential.[1]

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[1] A writ of *certiorari* in this case, in conjunction with the Court's recent grant of *certiorari* in *Wright v. Universal Maritime Service Corp.*, 118 S. Ct. 1162 (1998), involving the arbitration of individual statutory discrimination claims pursuant to a collective bargaining agreement, will provide necessary direction from the Court on the enforcement of arbitration agreements contained in both individual and collective bargaining agreements.

A. Duffield's Employment With Robertson, Stephens

Respondent Tonyja Duffield ("Duffield") was a "sophisticated industry insider" (Appendix ("App.") at 78a) who had signed three prior arbitration agreements when, upon her hiring by Petitioner Robertson, Stephens & Co. ("Robertson, Stephens"), she again signed an application form known throughout the securities industry as a Form U-4. Paragraph 5 of the Form U-4 she signed reads as follows:

> I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register . . ..

App. at 10a. Duffield listed on her Form U-4 the New York Stock Exchange ("NYSE") and the National Association of Securities Dealers ("NASD") as organizations with which she was registered. *Id.*

The NYSE requires candidates for registration to agree to abide by the NYSE Constitution and Rules (CR 76, SER 555)[2] and has required employees of its member firms to arbitrate disputes with their employers since at least 1958. App. at 67a. NYSE Rule 347 provides:

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[2] "CR" refers to docket number in the court record below, and citations to "ER" and "SER" refer to the specified pages of Appellant's Excerpts of Record and Appellee's Supplemental Excerpts of Record, respectively.

> Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules.

App. at 10a.

After almost six years at Robertson, Stephens, Duffield resigned in April 1994 to work at another securities firm. (CR 77, SER 559 ¶ 4).

B. Duffield's Complaint

In January 1995, Duffield filed a complaint in federal court containing nine claims for relief. Her first claim seeks a declaration under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, that her agreements to arbitrate are not enforceable because, among other reasons, the 1991 Civil Rights Act precludes waiver of a judicial forum for Title VII and state statutory claims when the agreement is signed as a condition of employment. App. at 3a. Duffield's other claims for relief included alleged violations of Title VII, 42 U.S.C. §§ 2000e *et seq.*; California's Fair Employment and Housing Act, Cal. Gov't Code §§ 12900-12996 ("FEHA"); fraud and deceit; breach of contract; breach of the covenant of good faith and fair dealing; intentional infliction of emotional distress; and negligent infliction of emotional distress. App. at 12a.

C. The District Court's Orders

Duffield moved for partial summary judgment on her declaratory relief claim. The district court denied Duffield's motion for partial summary judgment on the grounds that (1) her arbitration agreement was not an unconstitutional condition of employment because there was no state action; (2) the NYSE arbitration scheme adequately protects Duffield's Title VII rights; and (3) Title VII as amended by the Civil Rights Act of 1991 did not preclude enforcement of arbitration agreements entered into as a condition of employment. App. at 68a-70a. Robertson, Stephens then moved to compel arbitration under the FAA and the NYSE Rules. The district court granted the motion, finding that (1) Duffield's agreement under the NYSE Rules was "knowing," and (2) it was not an unconscionable adhesion contract. App. at 80a, 82a. The district court certified its orders under 28 U.S.C. § 1292(b), and the Ninth Circuit accepted the appeal.

D. The Court of Appeals' Decision

Writing for the Ninth Circuit panel, Judge Stephen Reinhardt held that Duffield could not be compelled to arbitrate her Title VII and state statutory antidiscrimination claims, despite her agreement to do so, because Congress in passing the Civil Rights Act of 1991 intended to preclude enforcement of such agreements when they were entered into as a condition of employment. App. at 9a. The Ninth Circuit rejected the argument that the Civil Rights Act of 1991 "encouraged" arbitration and found support for its holding in the text of the 1991 Civil Rights Act, specifically Section 118 of that

Act, its legislative history, and the underlying purposes of Title VII and the 1991 Civil Rights Act.

1. The text of Section 118

Section 118 of the 1991 Civil Rights Act, Pub. L. 102-166, *reprinted in* notes to 42 U.S.C. § 1981 states:

> Where appropriate and to the extent authorized by law, the use of alternative dispute resolution including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and *arbitration* is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title. (Emphasis added.)

The Ninth Circuit construed the introductory phrase "[w]here appropriate" as meaning "where arbitration furthers the purpose and objective of the Act -- by affording victims of discrimination an *opportunity* to present their claims in an alternative forum, a forum that *they* find desirable -- not by forcing an unwanted forum upon them." App. at 32a. Next, the court asserted that the phrase "to the extent authorized by law" meant Congress' perception of the law "at the time Congress drafted § 118, and it was reported out of the House Education and Labor Committee." App. at 33a. The Ninth Circuit stated that at that point in time, based on this Court's decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), the circuit courts "had 'widely interpreted' Title VII as prohibiting '*any form* of compulsory arbitration,' including in individual employment cases." App. at 34a (quoting *Prudential*

Insurance Co. v. Lai, 42 F.3d 1299, 1303 (9th Cir. 1994), *cert. denied*, 116 S. Ct. 61 (1995)).

According to the Ninth Circuit, the majority view of *Gardner-Denver* did not change until after Section 118 and the House Education and Labor Committee report were drafted, when this Court decided *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). Based on this sequence of events, the court found that Congress had intended to codify the pre-*Gilmer* interpretation of *Gardner-Denver*.

2. The legislative history of Section 118

The Ninth Circuit found support for its interpretation of Section 118 in two House committee reports and certain selected statements made in the floor debate on the 1991 Civil Rights Act. The Ninth Circuit quoted from the House Committee on Education and Labor report the statement that the committee "believes that any agreement to submit disputed issues to arbitration, whether in the context of collective bargaining or in an employment contract, *does not preclude the affected person from seeking relief under the enforcement provisions of Title VII*." App. at 36a-37a. The court summarized its analysis of the legislative history as follows: "No statements were made in reports, on the floor, or by the President that contradicted" an intent to codify the pre-*Gilmer* judicial interpretation of *Gardner-Denver*. App. at 41a.

3. The purpose of the Civil Rights Act of 1991

The Ninth Circuit also relied on its view of the purpose of the 1991 Civil Rights Act to support its holding below. The court stated that the purpose of the Act was "uniformly to *expand* employees' rights and 'to *increase* the possible remedies.'" App. at 29a (quoting *Lai*, 42 F.3d at 1304). Thus, in the court's view, it was unlikely that

> Congress "encouraged" the use of a process whereby employers condition employment on their prospective employees' surrendering their rights to a judicial forum for the resolution of all future claims of race or sex discrimination and force those employees to submit all such claims to compulsory arbitration.

Id.[3] In light of the court's holding that Duffield's Form U-4 arbitration agreement was not enforceable as to Title VII and state antidiscrimination claims, the court did not reach Duffield's other challenges to arbitration of these claims. App. at 22a n.7. Addressing Duffield's only challenge to arbitration of her common law claims, the

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[3] The court in footnote 3 links Congress' intent as to Title VII to its intent as to all state statutory antidiscrimination claims:

> Duffield's . . . claims under Title VII appear to be identical to those she brings under the FEHA. Because "[p]arallel state anti-discrimination laws are explicitly made part of Title VII's enforcement scheme," FEHA claims are arbitrable to the same extent as Title VII claims.

App. at 14a n.3 (citations omitted). The remainder of the decision does not address Duffield's FEHA claims.

Ninth Circuit rejected Duffield's argument that mandatory arbitration was an unconstitutional condition of employment because, like the district court, it found no state action. App. at 9a. Accordingly, the decision below affirmed the district court's order compelling arbitration of Duffield's state tort and contract claims. App. at 56a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH THE DECISION OF EVERY OTHER CIRCUIT COURT THAT HAS ADDRESSED THIS ISSUE.

The Ninth Circuit's holding that Congress intended to preclude waiver of a judicial forum in favor of an arbitral forum for statutory antidiscrimination claims conflicts with the decisions of all other circuit courts that have addressed the issue. The clearest example of the circuit split is the Third Circuit's recent decision in *Seus v. John Nuveen & Co.*, ___ F.3d ___, No. 97-1498, 1998 WL 294020 (3d Cir. June 8, 1998). Issued after the *Duffield* decision, the Third Circuit's decision considered the arbitrability of Title VII claims and expressly "disagree[d] with the decision of the Court of Appeals for the Ninth Circuit in *Duffield*." *See id.* at *8. The Third Circuit considered the enactment of Section 118 "more than six months after *Gilmer* was decided" and found that "[o]n its face, the text of [Section] 118 evinces a clear Congressional intent to encourage arbitration of Title VII and [Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* ("ADEA")] claims, not to preclude such arbitration." *Id.* at *8.

The Third Circuit in *Seus* specifically rejected the Ninth Circuit's conclusion that Section 118 "impliedly repealed [the FAA] with respect to agreements to arbitrate Title VII claims which were executed by an employee as a condition of securing employment." *Id.* The Third Circuit reasoned that Section 118's prefatory clause, "[w]here appropriate and to the extent authorized by law," should be read "as a reference to the FAA." *Id.* In examining the two House committee reports relied on in *Duffield*, the Third Circuit found "ample legislative history to support a straightforward reading of the text of [Section] 118," *id.* n.1, and "nothing . . . suggesting that this hortatory provision was intended to codify, and thus freeze, any particular view of the case law." *Id.* Finally, the Third Circuit declined to interpret "authorized by law" in a manner "inconsistent with a Supreme Court case decided six months before the passage of the Act." *Id.* *See also Mouton v. Metropolitan Life Insurance Co.*, __ F.3d __, 1998 WL 396827, *2 (5th Cir. July 31, 1998) (holding Title VII claims arising after 1991 Act arbitrable; recognizing conflict with *Duffield*).

At least four other circuit court decisions issued before the decision below squarely conflict with the Ninth Circuit decision by holding that Title VII or ADEA claims filed after the Civil Rights Act of 1991 are arbitrable:

Fourth Circuit. *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 882 (4th Cir.), *cert. denied*, 117 S. Ct. 432 (1996) (collecting cases surveyed and noting that "[e]very [circuit] case decided . . . under [Section] 118 of the 1991 amendments to the Civil Rights Act has enforced anticipatory agreements to arbitrate claims

involving statutory rights"). Enforcing an agreement to arbitrate Title VII claims pursuant to a collective bargaining agreement's arbitration provisions, the court stated: "The language of [Section 118] could not be any more clear in showing Congressional favor towards arbitration." *Id.* at 881.

Seventh Circuit. *Matthews v. Rollins Hudig Hall Co.*, 72 F.3d 50, 54 n.4 (7th Cir. 1995) (holding ADEA claims arbitrable and stating that "the Civil Rights Act of 1991 encouraged the use of arbitration to resolve ADEA claims") (citing Section 118).[4]

Eighth Circuit. *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 837 (8th Cir. 1997) ("the arbitrability of Title VII claims finds support in the Civil Rights Act of 1991" based on Section 118, which "encourage[s]" arbitration).

District of Columbia Circuit. *Cole v. Burns Inter. Security Services*, 105 F.3d 1465, 1472-73 (D.C. Cir. 1997) (enforcing mandatory agreement to arbitrate Title VII claims). The District of Columbia Circuit held that *Gilmer* required enforcement of agreements signed "*as a condition of employment*, to forego all access to jury trials and . . . to use arbitration in place of judicial fora for the resolution of statutory as well as contractual claims."[5]

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[4] The ADEA, along with Title VII, was among the statutes amended by the Civil Rights Act of 1991. The ADEA is thus subject to Section 118 of the 1991 Act.

[5] The decision below also conflicts with decisions of the highest state courts of New York and the District of Columbia. *See Benefits Communications v. Klieforth*, 642 A.2d 1299, 1304 (D.C. 1994) ("We find nothing in [Section

One circuit that has not yet addressed the effect of Section 118 on the arbitrability of Title VII claims -- the First -- has enforced mandatory arbitration agreements as to claims under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12212, based on a provision virtually identical to Section 118 which "encourage[s]" arbitration "[w]here appropriate and to the extent authorized by law." *Bercovitch v. Baldwin School, Inc.*, 133 F.3d 141, 149 (1st Cir. 1998) (if ADA provision "encourag[ing]" arbitration "were not interpreted to permit prospective waiver of a judicial forum, it would be superfluous."). *See also Miller v. Public Storage Mgmt., Inc.*, 121 F.3d 215, 218 (5th Cir. 1997) (ADA's arbitration provision "persuasively demonstrates that Congress did not intend to exclude the ADA from the scope of the FAA").[6]

118] which can be construed as modifying or undermining the holding of *Gilmer.*"); *Fletcher v. Kidder, Peabody & Co.*, 619 N.E.2d 998 (N.Y.) (Section 118 and its legislative history do not show "congressional intent to override the general rule that anticipatory contracts to arbitrate are enforceable under the FAA"), *cert. denied*, 114 S. Ct. 554 (1993). The federal district courts are divided on the issue. *Compare EEOC v. Frank's Nursery & Crafts, Inc.*, 966 F. Supp. 500, 504 (E.D. Mich. 1997) (enforcing agreement to arbitrate Title VII claim after 1991 Act) *with Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 995 F. Supp. 190, 1991 WL 81907 (D. Mass. Jan. 26, 1998) (holding post-1991 Act Title VII claim not arbitrable). The First Circuit heard oral argument in *Rosenberg*, No. 98-1246, on July 27, 1998.

[6] In addition, four circuits other than the Ninth Circuit have held that agreements to arbitrate entered into as a

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S ARBITRATION CASES AND IS IN ERROR.

A. The Ninth Circuit Failed to Follow *Gilmer*.

The Ninth Circuit decision in this case conflicts squarely with *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). The facts and issues in *Gilmer* are virtually indistinguishable from *Duffield*. Like Duffield, Gilmer was "an experienced business[person]" who signed a Form U-4 in which he agreed to arbitrate any employment dispute pursuant to NYSE arbitration procedures. 500 U.S. at 33. Gilmer filed a federal complaint alleging violation of the ADEA and argued that he should not be compelled to arbitrate the claim, despite his agreement to do so, because arbitration was inconsistent with the purpose of the ADEA. *Id.* at 27.

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condition of employment are enforceable with respect to pre-1991 Civil Rights Act claims under Title VII: *Metz v. Merrill Lynch, Pierce, Fenner & Smith*, 39 F.3d 1482, 1487 (10th Cir. 1994); *Bender v. A.G. Edwards & Sons*, 971 F.2d 698, 700 (11th Cir. 1992); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 312 (6th Cir. 1991); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229 (5th Cir. 1991). Even the Ninth Circuit has held in prior decisions that Title VII claims, both before and after the 1991 Civil Rights Act, were subject to arbitration agreements entered into as a condition of employment. *See Nghiem v. NEC Electronic, Inc.*, 25 F.3d 1437, 1441 (9th Cir. 1994) (post-1991 Act claim); *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932, 935 (9th Cir. 1992) (pre-1991 Act claim).

In rejecting Gilmer's argument, the Court found that notwithstanding the "important social policies" of the ADEA, there was no "inherent inconsistency between those policies . . . and enforcing agreements to arbitrate age discrimination claims." *Id.* The Court also rejected Gilmer's arguments that NYSE arbitration procedures were inadequate (*id.* at 30-31) and that the arbitration agreement was the result of unequal bargaining power (*id.* at 32-33). Finally, the Court in *Gilmer* distinguished *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), which held that arbitration of Title VII claims pursuant to a collective bargaining agreement did not preclude the claimant from bringing those claims in federal court. The *Gilmer* Court held that *Gardner-Denver*'s rationale, based on the contractual rights protected in the collective bargaining setting, did not apply to individual agreements to arbitrate statutory claims. *Id.* at 35.

By the time *Gilmer* was decided, it was "clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA." 500 U.S. at 26.[7] As this Court stated: "'[H]aving made the bargain

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[7] *Gilmer* followed a trilogy of cases in which the Court applied the presumption under the FAA that important federal statutory rights and policies were subject to mandatory arbitration. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (Sherman Act antitrust claims are arbitrable); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (claims under SEC Rule 10b-5 and Racketeer Influenced and Corrupt Organization Act are arbitrable); *Rodriguez de Quijas v. Shearson/American Express, Inc.*,

to arbitrate, the party should be held to it unless Congress itself has *evinced* an intention to preclude a waiver of judicial remedies for the statutory rights at issue.'" *Id.* (quoting *Mitsubishi Motors Corp.*, 473 U.S. at 628) (emphasis added). By placing the burden of establishing such congressional intent on the party opposing arbitration, *id.*, and by using the word "evince," meaning to "show or demonstrate clearly" (*American Heritage Dictionary* at 636 (3d ed. 1992)), the Court reveals the rigorousness of this standard. This Court has never found a statutory claim exempt from the requirements of the FAA under this standard.

The conflict between *Duffield* and *Gilmer* arises both from the Ninth Circuit's disregard of the FAA's presumption of arbitrability and the court's mistaken view that arbitration involves a waiver of substantive rights. The decision below asserts that Congress could not have intended, in a statute designed "to strengthen existing protections and remedies," to allow an agreement as a condition of employment "surrendering [employees'] rights to a judicial forum for the resolution of all future [discrimination] claims . . . and force those employees to submit all such claims to compulsory arbitration." App. at 29a-30a. As this Court determined in *Gilmer*, however, agreements to arbitrate "do[] not forgo the substantive rights afforded by the statute" but merely constitute a change in fora. 500 U.S. at 26.

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490 U.S. 477 (1989) (claims under the Securities Act of 1933 and Securities and Exchange Act of 1934 are arbitrable).

Gilmer found mandatory arbitration consistent with the purposes of the ADEA. No meaningful distinction exists in this context between Title VII and the ADEA. As this Court and others have found, the ADEA and Title VII are similar statutory schemes. *See, e.g., Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979); *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932, 935 (9th Cir. 1992). Nor has the 1991 Civil Rights Act changed the fundamental purpose of Title VII. *See Joyner v. Monier Roof Tile, Inc.*, 784 F. Supp. 872, 879 (S.D. Fla. 1992).[8]

The Ninth Circuit's strained reading of the text of Section 118 provides further evidence of its rejection of *Gilmer*. The phrase "[w]here appropriate," according to the Ninth Circuit, means where arbitration is the forum chosen by plaintiffs, not "forc[ed] . . . upon them." App. at 32a. Thus, the Ninth Circuit concluded, Congress meant to "encourage[ ]" only *post*-dispute agreements to arbitrate. *Id.* This contradicts the holding in *Gilmer* that a pre-dispute "compulsory arbitration" agreement entered into as a condition of employment was enforceable (500 U.S. at 23) and ignores the admonishment, based on the dictates of the FAA, that having made the bargain to arbitrate the agreement is enforceable "'save upon such

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[8] The creation in the 1991 Civil Rights Act of the right to a jury trial for Title VII claims does not change the analysis. The right to a jury trial for ADEA claims was clearly established 13 years before *Gilmer*, *see Lorillard v. Pons*, 434 U.S. 575, 577 (1978), yet this Court in *Gilmer* found arbitration fully consistent with the purpose of the ADEA.

grounds as exist at law or in equity for the revocation of any contract.'" 500 U.S. at 33 (quoting 9 U.S.C. § 2)).

B. The Ninth Circuit Decision in *Duffield* Is in Error.

In addition to conflicting with this Court's decisions in *Gilmer* and other cases under the FAA, the holding below errs by misreading the language of Section 118, its legislative history, and the purpose of the Civil Rights Act of 1991.

1. The 1991 Civil Rights Act Promotes, Rather Than Precludes, the Use of Arbitration to Resolve Disputes Under the Act.

a. Section 118 "encourage[s]" arbitration.

The Ninth Circuit's reading of the text of Section 118 of the Civil Rights Act of 1991 is contrary to the plain meaning of the text in at least two respects.

First, the Ninth Circuit's conclusion that the phrase "[w]here appropriate" means where arbitration has not been "forc[ed]" on the plaintiff finds no support in the 1991 Civil Rights Act or Title VII. The Ninth Circuit ignores the most sensible meaning of the phrase, which, in context, refers to a laundry list of alternative means of dispute resolution: "settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration." Which of these forms of Alternative Dispute Resolution ("ADR") is "appropriate" varies from case to case, depending on numerous factors, including the number of parties, the ability of the parties to pay, whether the parties are represented by counsel, the size of

the monetary claim, scheduling issues, and the existence of an arbitration agreement.

Second, the Ninth Circuit erroneously concluded that "to the extent authorized by law" means Congress' perception of the law "at the time Congress ***drafted*** § 118, and it was reported out of the House Education and Labor Committee." App. at 33a (emphasis added). As the Third Circuit recently noted in *Seus v. John Nuveen & Co.*, 1998 WL 294020 (3d Cir. June 8, 1998), this statutory language does not show an intent to codify any particular view of the law. *Id.* at *8. The most natural reading of this clause, as the Third Circuit and every other circuit court to consider the issue have held, is that it does not establish an *independent* limitation on the use of alternative means of dispute resolution, but rather acknowledges that *other* laws, such as the FAA, may govern the applicability of certain forms of ADR.[9]

The Ninth Circuit's insupportable proposition that Congress intended to freeze the state of the law at a time six months prior to final passage of the Act is counter to the well-established canon that Congress is presumed to know the law when it enacts legislation and to adopt existing judicial interpretations when it enacts or amends statutes. *See Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 1998 WL 336322, at *11 (U.S. June 26, 1998) (in the

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[9] For example, while private settlement -- one of the ADR options listed in Section 118 -- is generally available for claims between individual parties participating in litigation, Federal Rule of Civil Procedure 23(e) requires court approval for settlement of a class action.

1991 Civil Rights Act, Congress is presumed to adopt judicial interpretations related to the subject of the 1991 amendments *unless* Congress modified the Court's holdings in those amendments); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988).

The timing of *Gilmer* and the passage of the 1991 Civil Rights Act does not support the Ninth Circuit's conclusion that Section 118 demonstrated congressional intent to repeal *Gilmer*. Contrary to the assertion by the court below that Congress passed the 1991 Civil Rights Act "[a]lmost simultaneously" with the issuance of *Gilmer*, this Court's decision in *Gilmer* precedes passage of the 1991 Civil Rights Act by nearly six months. Ample time occurred after this Court issued the *Gilmer* decision on May 13, 1991 and before the final passage of the 1991 Civil Rights Act on November 7, 1991 for Congress to amend the Act to abrogate *Gilmer*, if it had wanted to do so.

Indeed, Congress in the 1991 Civil Rights Act expressly abrogated two Supreme Court cases decided in March of that year -- *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991), and *EEOC v. Arabian American Oil Company*, 499 U.S. 244 (1991) -- while the Act was pending in Congress. These cases were overruled by an amendment to H.R. 1 which passed the House on June 5, 1991. *See* 137 Cong. Rec. H3950 (daily ed. June 5, 1991) (statement by Rep. Edwards that the amendment "adds two new sections to reverse Supreme Court decisions announced after committee consideration of this year's bill"). By contrast, Congress did not consider any

amendment to the 1991 Civil Rights Act after *Gilmer* issued on the subject of mandatory arbitration.

The Ninth Circuit erroneously asserted that "at the time the 1991 Act was enacted it was still at least *an open question* whether *Gilmer* applied to Title VII claims." App. at 34a (emphasis added). This assertion ignores several important court decisions issued prior to passage of the 1991 Civil Rights Act holding that *Gilmer* applied to Title VII claims. Soon after announcing its decision in *Gilmer*, this Court vacated the Fifth Circuit's decision in *Alford v. Dean Witter Reynolds, Inc.*, 905 F.2d 104 (5th Cir. 1990), which held that a Title VII claim was not arbitrable and remanded the case for further consideration in light of *Gilmer*. *Dean Witter Reynolds, Inc. v. Alford*, 500 U.S. 930 (1991). The Fifth Circuit held on remand that *Gilmer* applied to Title VII. *See Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229 (5th Cir. 1991) (decided Aug. 2, 1991). Several state and federal district courts across the country had also held, prior to passage of the 1991 Civil Rights Act, that *Gilmer* applied to Title VII or related state antidiscrimination statutes.[10] Certainly, in the six months

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[10] *See, e.g., Kaliden v. Shearson Lehman Hutton, Inc.*, 789 F. Supp. 179 (W.D. Pa. 1991) (Pennsylvania Human Relations Act claim) (decided Aug. 14, 1991); *Nelsen v. Colleary*, 574 N.Y.S.2d 912 (N.Y. Sup. 1991) (sex harassment claim under New York Human Rights Law) (decided Sept. 23, 1991); *Higgins v. Superior Court*, 234 Cal. App. 3d 1464 (1991) (sex discrimination claim under FEHA and Title VII claim) (decided Oct. 8, 1991), *depublished* Jan. 8, 1992. On the same day as Congress passed the 1991 Act, the Sixth Circuit joined the Fifth in

prior to passage of the 1991 Civil Rights Act, no court had held that *Gilmer* did *not* apply to Title VII claims. These decisions demonstrate the growing consensus around the country that *Gilmer* applied to Title VII claims. *See Thompson v. Thompson*, 484 U.S. 174, 180 (1988) (assuming Congress' view of the law to be the lower courts' consensus where this Court has not spoken to the contrary).

b. The legislative history of Section 118 does not evince congressional intent to preclude arbitration.

The Ninth Circuit erroneously found, based on scant evidence from two House committee reports and selected comments of individual legislators, that Congress evinced its intent to preclude a waiver of a judicial forum for Title VII claims. As a threshold matter, the Ninth Circuit had no need to reach the legislative history. *Gilmer* did not, in its reference to searching for Congressional intent in the legislative history, alter the long-standing rule that legislative history has no role in statutory construction where the text is clear and unambiguous. *Salinas v. United States*, 118 S. Ct. 469, 474 (1997). Section 118's unambiguous "encourage[ment]" of arbitration precludes any need to seek the assistance of legislative history to resolve this issue. *Seus*, 1998 WL 294020, at *8; *Austin*, 78 F.3d at 881.

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holding that *Gilmer* applied to Title VII claims. *See Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305 (6th Cir. 1991).

Nonetheless, an examination of the relevant legislative history shows that it provides no clear evidence of congressional intent to preclude arbitration. The House Committee Report on Labor and Education states, as quoted by the Ninth Circuit: "The Committee does not intend this section to be used to preclude rights and remedies that would otherwise be available." App. at 37a. The Ninth Circuit's conclusion that this statement shows Congress' intent to preclude arbitration ignores this Court's teaching that an arbitration agreement "does not forgo the substantive rights afforded by the statute" and "the NYSE rules applicable here do not restrict the types of relief an arbitrator may award." *Gilmer*, 500 U.S. at 26, 32.

The Ninth Circuit ultimately resorts to the least reliable indicia of legislative intent -- the stray comments of individual legislators. App. at 40a-41a. *Garcia v. United States*, 469 U.S. 70, 76 (1984). The Ninth Circuit, however, ignores *two* citations to *Gilmer* in the floor debate endorsing mandatory arbitration. Sen. Dole and Rep. Hyde both said:

> In light of the litigation crisis facing this country and the increasing sophistication and reliability of alternatives to litigation, there is no reason to disfavor the use of such forums. See *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991).

137 Cong. Rec. S15472, S15478 (daily ed. Oct. 30, 1991) (statement of Sen. Dole); 137 Cong. Rec. H 9505, H9548 (daily ed. Nov. 7, 1991) (statement of Rep. Hyde). The Ninth Circuit's selective survey is nothing other than the practice described by Justice Breyer as "'looking over a

crowd and picking your friends.'" Stephen Breyer, *On the Uses of Legislative History in the Interpretation of Statutes*, 65 S. Cal. L. Rev. 845, 845-46 (1992) (quoting Judge Leventhal).

c. Arbitration is consistent with the purpose of the 1991 Civil Rights Act.

The decision below found that arbitration was inconsistent with the purpose of the 1991 Civil Rights Act. Based on its view that the purpose of the 1991 Civil Rights Act was to expand employees' rights and remedies, the Ninth Circuit reasoned that it would be "'at least a mild paradox'" to conclude that Congress in Section 118 "encouraged" mandatory arbitration as a condition of employment. App. at 29a. Just as legislative history cannot be used to contradict the text of a statute, the Ninth Circuit's embellished view of the purpose of the 1991 Civil Rights Act cannot accomplish this purpose. The *Duffield* panel simply disagrees with the Congressional choice to "encourage[ ]" arbitration. Of course, Congress' view as expressed in the FAA and the text of Section 118, and not that of the Ninth Circuit panel, is controlling on the issue.

2. No Support Exists for the Ninth Circuit's Conclusion that Congress Evinced its Intent to Preclude Arbitration of State Statutory Antidiscrimination Claims.

In addressing Duffield's claim under California's Fair Employment and Housing Act, the Ninth Circuit concluded, without analysis, that "FEHA claims are arbitrable to the same extent as Title VII claims" because

"state anti-discrimination laws are explicitly made part of Title VII's enforcement scheme." App. at 14a n.3. The Ninth Circuit supports this sweeping conclusion with citations to two cases, neither of which involves the arbitration of state statutory claims.[11]

In its text and legislative history, the 1991 Civil Rights Act never mentions the arbitrability of state antidiscrimination statutes. By its terms, Section 118 only applies to "disputes arising under the Acts or provisions of Federal law amended by this title." Pub. L. 102-166, § 118. In light of this express restriction (and regardless of any conclusions reached with respect to Title VII claims), no basis exists for the Ninth Circuit's conclusion that Congress evinced its intent to preclude arbitration of state statutory antidiscrimination claims. *See Gilmer*, 500 U.S. at 26 (under the FAA, burden is on plaintiff to demonstrate that Congress intended to preclude arbitration of the statutory claim at issue). In fact, numerous state cases applying the FAA have enforced mandatory arbitration agreements with respect to claims under FEHA and other state antidiscrimination statutes. *See, e.g., Brookwood v. Bank of America*, 45 Cal. App. 4th 1667, 1674 (1996); *Fletcher v. Kidder, Peabody & Co.*, 619 N.E.2d 998, 1003 (N.Y.), *cert. denied*, 510 U.S. 993 (1993).

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[11] *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 467-77 (1982) (state court decisions on state nondiscrimination statutory claim entitled to preclusive effect on Title VII claims); *Salgado v. Atlantic Richfield*, 823 F.2d 1322, 1326 (9th Cir. 1987) (addressing tolling of statute of limitations for FEHA claim).

III. THE COURT SHOULD RESOLVE THIS CIRCUIT SPLIT BECAUSE IT IS VITALLY IMPORTANT TO EMPLOYERS, EMPLOYEES, AND COURTS NATIONWIDE.

The issue of arbitrability of Title VII and state antidiscrimination claims is of immediate and vital concern to employers, employees, and the federal and state courts throughout the country. Although this case arose in the securities industry, its impact is far broader. The question considered below affects every agreement between employers and employees to arbitrate Title VII and state antidiscrimination claims in nearly every sector of the economy. *See* App. at 46a-47a.

A. This Question Significantly Affects Employers and Employees Throughout the Country.

Since this Court's decision in *Gilmer*, a growing number of employers have instituted arbitration procedures for employment disputes. A 1994 General Accounting Office survey of private businesses found that about 10% of employers had arbitration procedures in place for discrimination complaints. U.S. General Accounting Office, *Employment Discrimination: Most Private-Sector Employers use Alternative Dispute Resolution* at 7 (GAO/HEHS-95-150).[12]

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[12] Although specific data for more recent years is not available, since 1994 arbitration has become more popular. *See* U.S. General Accounting Office, *Alternative Dispute Resolution: Employers' Experiences With ADR in the Workplace* at 14 (GAO/GGD-97-157) ("ADR In the Workplace").

Arbitration has grown in popularity in direct response to the increasing strain of employment litigation on court dockets and, as cases drag on for months and years, litigants. The number of employment discrimination lawsuits filed in federal courts nearly doubled in four years, from 12,962 in fiscal year 1993 to 23,796 in fiscal year 1997. Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts: 1997 Report of the Director* 132 (1998). Meanwhile, during that same period, the median time to trial for a civil suit in the federal courts increased more than 18% to 19 months. *Id.* at 175; Administrative Office of the U.S. Courts, *United States Courts: Selected Reports 1993* at A1-102 (1994). To cope with this growing burden, the federal courts promote the diversion of cases to alternative means of dispute resolution, including arbitration. Judicial Conference of the United States, *Long Range Plan for the Federal Courts* at 134 (1995).

Apart from its effect on local and regional companies, the *Duffield* decision burdens the thousands of nationwide employers with operations in the Ninth Circuit. In the securities industry alone, where arbitration of employment disputes is commonplace, more than 100 securities firms with offices within the Ninth Circuit also have offices within other circuits. *See Standard & Poor's Security Dealers of North America* (1998). These nationwide employers require a uniform rule in order to obtain the full benefits of arbitration. The *Duffield* decision imposes unique costs on businesses that have invested in nationwide ADR programs. A major motivation for arbitration of discrimination claims is the reduction of costs in terms of time and legal fees. *See ADR In the*

Workplace at 8. For example, Houston-based Brown & Root, Inc. instituted mandatory arbitration for its 27,000 U.S. employees after the company spent $400,000 in legal fees to successfully defend itself in one discrimination suit. *Id.* at 39. The arbitration program has reduced the company's legal fees by 90% while still providing a neutral forum for enforcement of employees' statutory and common law rights. *Id.* at 40.

After *Duffield*, a nationwide employer will continue to bear the cost of administering its ADR program for employees outside the Ninth Circuit.[13] Now, however, that employer must make a difficult choice. It must either exclude employees within the Ninth Circuit from arbitration -- leading to differing personnel policies depending on the employee's location -- or bear the added cost of arbitration *and* litigation, often in the same case. In the present litigation, by way of example, Duffield brings state tort and contract claims, which are clearly arbitrable, and Title VII and state antidiscrimination claims, which the Ninth Circuit deemed non-arbitrable. Because both the arbitrable and non-arbitrable claims involve the same facts and witnesses, the Ninth Circuit decision imposes the additional cost of duplicative proceedings on the parties. Bifurcated claims will not be unique to this case. Claims for age discrimination (arbitrable under *Gilmer*) coupled with claims for sex

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[13] Depending on the nature of the program, these costs may be substantial. Brown & Root's ADR program had an annual budget of $500,000 in 1997. *See ADR In the Workplace* at 40.

discrimination under Title VII would also result in dual arbitral-judicial proceedings. Such bifurcation imposes inefficiencies and costs on resolution of employment disputes within the Ninth Circuit and is contrary to the federal policy in favor of arbitration.

B. The Ninth Circuit's Treatment of State Discrimination Claims Has Equally Broad Effect.

The *Duffield* decision sweeps within its ambit the fair employment statutes adopted by nearly every state and the District of Columbia. 8A Lab. Rel. Rep. (BNA) ¶ 451:1 (1995). Many employment disputes involve only state statutory claims (*see, e.g.*, *Prudential Insurance Co. v. Lai*, 42 F.3d 1299 (9th Cir. 1994) (FEHA claims)) or, like the instant case, both state and federal statutory claims. The *Duffield* decision's prohibition on the arbitration of state statutory claims is as significant a burden on the FAA's pro-arbitration policy as is the court's ruling regarding Title VII claims.

C. Courts and Practitioners Are Actively Litigating This Question and Closely Tracking This Case.

As indicated by the quick response of other circuit and trial courts to the *Duffield* decision, courts and parties to employment disputes are currently expending considerable efforts litigating this precise question around the country. *See, e.g., Seus*, 1998 WL 294020, at *8 (rejecting *Duffield*); *Winkler v. Pacific Brokerage Servs., Inc.*, No. 97 C 7340, 1998 WL 341622 (N.D. Ill. June 19, 1998) (following *Duffield*). Even where courts ultimately enforce agreements

to arbitrate, the effort spent to obtain this result negates the primary benefits of arbitration -- swiftness and economy. Much additional litigation in the lower courts could be avoided by resolution of the circuit split by this Court.[14]

The widespread interest in the arbitrability of Title VII claims is further demonstrated by the attention this case has drawn from many quarters. Twelve amici curiae, including the U.S. Equal Employment Opportunity Commission, filed nine briefs in this case in the Ninth Circuit.[15] In addition, major daily newspapers and legal publications have written about the sweeping effect of the *Duffield* decision. The *Los*

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[14] Widespread litigation will continue, regardless of the decision of the NASD not to require as a condition of registration that brokers and traders arbitrate statutory discrimination claims filed on or after January 1, 1999. 63 Fed. Reg. 35299, 35301 (June 29, 1998) (SEC Release No. 34-40109). Even if the NYSE were to propose amending its rule to conform with the new NASD rule, the issue decided in the court below would remain critical because, among other reasons, the Ninth Circuit's holding applies to arbitration agreements entered into as a condition of employment in *all* industries.

[15] The EEOC filed an amicus curiae brief on behalf of Duffield. Briefs amici curiae were filed in support of Duffield by the National Academy of Arbitrators, the National Employment Lawyers Association, Concerned Legal Scholars and Lawyers' Committee for Civil Rights Under Law (joined in by, among others, the NAACP Legal Defense and Educational Fund, Inc.). Robertson, Stephens' amici were the Equal Employment Advisory Council, California Employment Law Council, The Employers Group, and the Securities Industry Association.

Angeles Times quoted one law professor as stating that the *Duffield* decision "could affect millions of workers" in virtually every industry. *See* Henry Weinstein, "Decision Frees Workers from Mandatory Arbitration Rule; Labor: the Appeals Court Action, Allowing a Woman to Pursue Bias Claim in a Lawsuit, Could Affect Millions," *Los Angeles Times* at D1 (May 12, 1998).

CONCLUSION

For all of the foregoing reasons, the petition for writ of *certiorari* should be granted.

Respectfully submitted,

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August 4, 1998

APPENDICES

INDEX OF APPENDICES

Appendix A	Decision of the Ninth Circuit Court of Appeals	1a
Appendix B	Order of the District Court Vacating and Modifying Order of August 6, 1996	57a
Appendix C	Order of the District Court Dated March 13, 1997	72a
Appendix D	Order of the Ninth Circuit Court of Appeals Dated April 21, 1997	88a
Appendix E	Relevant Statutory Provisions	89a

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TONYJA DUFFIELD, *Plaintiff-Appellant*, v. ROBERTSON STEPHENS & COMPANY, a partnership; ROBERTSON STEPHENS & COMPANY, a corporation, *Defendants-Appellees*.	No. 97-15698 D.C. No. C-95-0199-EFL OPINION

Appeal from the United States District Court
for the Northern District of California
Eugene F. Lynch, District Judge, Presiding

Argued and Submitted
March 9, 1998—San Francisco, California

Filed May 8, 1998

Before: William C. Canby, Jr. and Stephen Reinhardt, Circuit Judges, and Jane A. Restani, Court of International Trade Judge.*
Opinion by Judge Reinhardt

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*Honorable Jane A. Restani, Judge, United States Court of International Trade, sitting by designation.

SUMMARY

Labor and Employment/Arbitration

The court of appeals affirmed a judgment of the district court in part and reversed in part. The court held that under the Civil Rights Act of 1991, a securities firm cannot require prospective broker-dealer employees to waive their right to bring employment-related suits under Title VII of the Civil Rights Act of 1964 and agree in advance to compulsory arbitration.

The securities industry requires those who work as broker-dealers to waive their right to a judicial forum and to resolve all employment-related disputes by arbitration, as mandated by the rules of the national securities exchanges. Prospective employees satisfy this requirement by signing the industry's "U-4" form, which provides that the employee agrees to submit such disputes to arbitration under the rules, constitutions, and bylaws of all organizations with which the employee registers.

When appellant Tonyja Duffield went to work for appellee Robertson Stephens and Company in 1988, she listed on her Form U-4 the New York Stock Exchange (NYSE) and the National Association of Securities Dealers (NASD), the exchanges of which Robertson Stephens is a member. Both the NYSE and the NASD have rules (NYSE Rule 347 and NASD Code of Arbitration Procedure § 1) that compel employees to arbitrate employment-related disputes at the request of their employees.

In 1995, Duffield sued Robertson Stephens in federal court, alleging sexual discrimination and sexual harassment in violation of Title VII of the Civil Rights Act of 1964, California's Fair Employment and Housing Act, and several tort and contract claims. She also requested a declaration that securities industry employees cannot be compelled to arbitrate employment disputes under the provisions of form U-4.

The district court rejected Duffield's claims and granted Robertson Stephens' motion to compel arbitration. The court certified the case for immediate appeal.

On appeal, Duffield contended: (1) that Form U-4's compulsory arbitration provision is not a voluntary agreement within the meaning of Title VII; (2) signing Form U-4 does not constitute a "knowing" agreement to arbitrate within the meaning of Title VII; (3) the NYSE's arbitration system does not adequately protect the substantive rights of employees under Title VII; (4) Form U-4 is a contract of adhesion because it forces employees to arbitrate Title VII claims under an inadequate arbitration system; and (5) with respect to her state-law and contract claims, the industry's mandatory arbitration requirement is an unconstitutional condition of employment.

[1] Section 118 of the Civil Rights Act of 1991 states that "where appropriate and the extent authorized by law," parties may opt to pursue alternative dispute resolution, including arbitration, to resolve their Title VII disputes. [2] In passing the 1991 Act, Congress explicitly directed courts that when the terms of Title VII are susceptible to alternative interpretations, courts are to select the construction that most effectively advances, the congres-

sional purpose of the act to *expand* employees' rights and to *increase* the remedies available to civil rights plaintiffs. Congress meant to encourage *voluntary* agreements to arbitrate—agreements such as those employers and employees enter into after a dispute has arisen because *both* parties consider arbitration to be a more satisfactory or expeditious method of resolving the disagreement.

[3] In § 118, Congress intended to encourage arbitration only under circumstances or conditions it deemed legally permissible *and* appropriate. [4] "Where appropriate" appears to mean where arbitration furthers the purpose and objectives of the Act—by affording victims of discrimination an *opportunity* to present their claims in an alternative forum that *they* find desirable-- not by forcing an unwanted forum on them. [5] "To the extent authorized by law" most likely codifies the law as Congress understood it at the time it drafted or passed the provision. The overwhelming weight of the law at the time Congress drafted § 118 and it was reported out of committee was to the effect that compulsory agreements to arbitrate Title VII claims are unenforceable.

[6] Section 118's legislative history made it clear that Congress in no way intended to authorize compulsory arbitration of Title VII claims. Its expressed intent was precisely the opposite. [7] Congress concluded that all mandatory agreements to submit disputed issues to arbitration as conditions of employment are "inappropriate" and therefore unenforceable. [8] In fact, Congress specifically rejected a proposal that would have allowed employers to enforce compulsory arbitration agreements.

[9] Form U-4 is unenforceable as applied to Title VII claims, and is precisely what Congress intended to prohibit in the 1991 Act: mandatory requirements under which prospective employees agree as a condition to employment to surrender their rights to litigate future Title VII claims in a judicial forum and accept arbitration instead. Form U-4 is a take-it-or-leave-it offer for anyone wishing to work as a broker-dealer in the securities industry. It forces individuals to opt for one of two "choices": sign or seek another profession. That sort of dilemma is fundamentally at odds with § 118, which was intended to deter employment discrimination by *increasing* claimants' choice of fora.

[10] *After a claim has arisen*, employees may believe that arbitration is preferable to litigation and willingly make that choice. Those plaintiffs are encouraged to resolve their employment disputes in that manner, and if they choose to do so, are bound by the arbitrator's decision.

[11] A threshold requirement of any constitutional claim is the presence of state action. However, this requirement does not restrict the application of the Constitution solely to governmental entities. Private entities like the NYSE and the NASD may be held to constitutional standards if their actions are "fairly attributable" to the state.

[12] The rules of the NYSE and the NASD are not fairly attributable to the government unless they carry the force of federal law. Prior to 1993, no federal statute or regulation required Duffield to register with the securities exchanges, much less sign Form U-4, or to arbitrate

employment disputes. When Duffield signed her Form U-4 in 1988, she did not do so because of any state action. [13] However, in 1993, the Securities and Exchange Commission (SEC) adopted a regulation requiring broker-dealers to be registered with at least one of the securities organizations of which Duffield's firm was a member. That regulation operates as federal law.

[14] State action can be present only to the extent that there is a sufficiently close nexus between the state and the challenged action. No federal law required Duffield to waive her right to litigation employment-related disputes by signing the Form U-4 in 1988, and no state action was present in simply enforcing that agreement.

[15] The SEC did not exercise sufficient influence over the compulsory arbitration requirement in Form U-4, the NASD procedures, or NYSE rules to deem that requirement the choice of the state. [16] The touchstone of state action in the context of governmental oversight is whether the government has moved beyond mere approval of private action into encouragement, endorsement, and participation of that action. [17] Duffield failed to put forth any example of governmental encouragement or endorsement of the compulsory arbitration requirement. The SEC's involvement was insufficient to render the industry's overall requirement that its employees submit to arbitration in lieu of court proceedings fairly attributable to the state.

[18] Since dispute resolution is not an exclusive governmental function, neither private arbitration nor the judicial act of enforcing it constitutes state action. The 1991 Civil Rights Act's allowance of voluntary, private arbitra-

tion agreements foreclosed the assertion that civil rights statutes should be exempted from this general rule.

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OPINION

REINHARDT, Circuit Judge:

This case presents the issue whether employers may require as a mandatory condition of employment in a certain profession — here, broker-dealer in the securities industry — that all employees waive their right to bring Title VII and other statutory and non-statutory claims in court and instead agree in advance to submit all employment-related disputes to binding arbitration. We hold that, under the Civil Rights Act of 1991, employers may not by such means compel individuals to waive their Title VII right to a judicial forum. At the same time, we hold that because no state action is involved there is no constitutional bar to employers requiring employees to agree in advance to arbitrate state-law tort and contract claims (other than for violation of a state civil rights law).

I

Like every individual who wishes to work in the United States as a broker-dealer in the securities industry, Tonyja Duffield was required, as a condition of employment mandated by the national securities exchanges, to waive her right to a judicial forum to resolve all "employment related" disputes and to agree instead to arbitrate any such disputes under the exchanges' rules. Prospective employees must satisfy this condition by signing the industry's Uniform Application for Securities Industry Registration or Transfer, commonly known as Form U-4, which registers them with all of the securities exchanges with which their employers are members. Paragraph 5 of Form U-4, the arbitration clause, reads as follows:

> I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register, as indicated in item 10 as may be amended from time to time.

Because Robertson Stephens & Co. is a member of the New York Stock Exchange ("NYSE") and the National Association of Securities Dealers ("NASD"), Duffield's "item 10" listed both of those organizations, and the form obligated her to abide by their rules, constitutions, and by-laws.

Both the NYSE and the NASD have rules that compel employees to arbitrate any employment-related dispute at the request of their employers. NYSE Rule 347 provides:

> Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules.

The NASD Code of Arbitration Procedure, as amended in 1993, provides:

> [A]ny dispute, claim, or controversy arising out of or in connection with the business of any member of the Association, or arising out of the employ-

ment or termination of associated person(s) with any members ... shall be arbitrated.

Id. at Part 1, § 1.[1] After signing her Form U-4 in 1988, Duffield began working as a broker-dealer for Robertson Stephens.

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[1]After Duffield filed her opening brief in this case, the NASD voted to eliminate its mandatory arbitration requirement with regard to civil rights claims. The organization's proposal, which cannot be formally implemented until the Securities and Exchange Commission approves it, would mandate three basic changes in the current rule: (1) it would "permit employees to choose between entering into private arbitration agreements with their employers, or reserving the right to file a case in federal or state court for statutory discrimination claims"; (2) it would guarantee heightened procedural protections in arbitration by requiring forums that satisfy the standards in the ABA's "Due Process Protocol"; and (3) it would provide "enhanced disclosure [of the arbitration rules] to employees." *NASD Proposes Eliminating Mandatory Arbitration of Employment Discrimination Claims for Registered Brokers*, NASD Press Release, August 7, 1997; *see also* Deborah Lohse, *NASD Votes to End Arbitration Rule in Cases of Bias*, Wall St. J., August 8, 1997, at B14 (reporting NASD policy change, but noting that "mandatory arbitration is apt to continue, industry experts say, because the NASD is not forbidding firms from including arbitration requirements in their employment contracts"). This probable change in NASD's rules in no way affects the dispute in this case, however. Furthermore, nothing in the record suggests that the NYSE is reconsidering its rule.

In January, 1995, Duffield brought suit in federal court, alleging sexual discrimination and sexual harassment in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and California's Fair Employment and Housing Act (FEHA), breach of contract, deceit, intentional infliction of emotional distress, and negligent infliction of emotional distress. As a threshold matter, she requested a declaratory judgment stating that securities industry employees cannot be compelled to arbitrate their employment disputes under the arbitration provision in Form U-4. She made five specific arguments in this regard: (1) that the "compulsory" arbitration requirement mandated by Form U-4 does not constitute a voluntary agreement to arbitrate within the meaning of Title VII; (2) that signing Form U-4 does not constitute a "knowing" agreement to arbitrate within the meaning of Title VII; (3) that the NYSE's arbitration system fails adequately to protect employees' substantive Title VII rights; (4) that Form U-4 is an unconscionable contract of adhesion because it forces her to arbitrate her Title VII claims under an inadequate arbitration system; and (5) that the industry's mandatory arbitration requirement constitutes an unconstitutional condition of employment. Only in connection with her final argument did Duffield contest the arbitrability of her state law and contract claims.

After allowing extensive discovery on the securities industry's arbitration system, the district court rejected each of Duffield's arguments. It first denied her motion for summary judgment on her declaratory relief claim, and later granted Robertson Stephens' motion to compel arbitration of all of her substantive claims. The court declined

to enter final judgment pursuant to Fed.R.Civ.P. 54(b) on Duffield's declaratory judgment claim, but certified both of its orders for immediate appeal pursuant to 28 U.S.C. § 1292(b).

On appeal, Duffield renews all five of her arguments below. We review de novo both the district court's denial of Duffield's motion for summary judgment, *Curnow v. Ridgecrest Police*, 952 F.2d 321, 323 (9th Cir. 1991), and its order compelling arbitration. *Zolezzi v. Dean Witter Reynolds, Inc.*, 789 F.2d 1447, 1449 (9th Cir. 1986). In Part II, we address Duffield's contentions that are unique to her Title VII claims, and in Part III we consider her constitutional challenge to Form U-4.

II

The security industry's Form U-4 requires employees to submit to a system that is most fittingly described as "compulsory arbitration." Throughout this opinion when we use the term "compulsory arbitration," we generally refer to the system under which employers compel their prospective employees as a condition of employment to waive their rights to litigate future employment-related disputes in a judicial forum (although the term applies as well to employees subjected to such a requirement for the first time during the course of their employment); under Form U-4, as in many other form or standard agreements, future employment-related disputes include, among others, all claims of discrimination that may arise under civil rights or other statutes. By compulsory arbitration, we do not, however, include systems under which employees agree, or otherwise elect, after disputes have arisen to submit them to arbitration. Nor do we include, for pur-

poses of this opinion, agreements in which at the time of hiring employers give prospective employees the choice to opt in advance for arbitration of all future employment-related disputes or for retention of their statutory right to litigate such disputes. In short, we refer to an arbitration agreement as "compulsory" when individuals must sign an agreement waiving their rights to litigate future claims in a judicial forum in order to obtain employment with, or continue to work for, the employer. The question of the enforceability of such agreements ordinarily arises when, during the course of employment, an event then occurs that causes an employee to claim that his rights have been violated, and the employer, relying on the provisions of the waiver, seeks to compel the unwilling employee to arbitrate the claim.[2]

In this case, Duffield argues that she may not be compelled to arbitrate her statutory claims of sexual discrimination and sexual harassment under the waiver mandated by Form U-4.[3] We consider her argument in

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[2]We do not in this opinion consider the enforceability of an arbitration award in instances in which an employee has submitted the dispute to arbitration without challenging the enforceability of the arbitration agreement. *See, e.g., Nghiem v. NEC Electronic*, 25 F.3d 1437 (9th Cir. 1994).

[3]Duffield's sexual discrimination and sexual harassment claims under Title VII appear to be identical to those she brings under the FEHA. Because "[p]aralle! state anti-discrimination laws are explicitly made part of Title VII's enforcement scheme," FEHA claims are arbitrable to the

two steps. First, we describe the historical and statutory evolution of the arbitrability of employment discrimination claims. Second, in light of that background, we evaluate Duffield's specific argument that the Civil Rights Act of 1991, Pub.L. No. 102-166, 105 Stat. 1071, precludes compulsory arbitration of Title VII claims.

A

The Supreme Court has long recognized that in enacting Title VII Congress envisioned that decisions and remedies from the federal courts would play a unique and indispensable role in advancing the social policy of deterring workplace discrimination on the basis of race, sex, and national origin. *See McKennon v. Nashville Banner-Publishing Co.*, 115 S. Ct. 879, 884-85 (1995) ("[t]he private litigant who seeks redress for his or her injuries vindicates both the deterrence and compensation objectives of the [anti-discrimination statutes]"); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 468 (1982) (stating that "the federal courts were entrusted with the ultimate enforcement responsibility" under Title VII); *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 750 (1981) (Burger, C.J., dissenting) (stating that federal courts should not defer to arbitration of Title VII claims "reached by the same combination of forces that had long perpetuated invidious discrimination"); *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975) (stating that federal court relief under

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same extent as Title VII claims. *Prudential Ins. Co. v. Lai*, 42 F.3d 1299, 1303 n.1 (9th Cir. 1994) (citing *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 477 (1982); *Salgado v. Atlantic Richfield*, 823 F.2d 1322, 1326 (9th Cir. 1987)).

Title VII not only compensates victims but vindicates broader public interest in deterring future discrimination); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44-45, 49-50 (1974) (describing congressional intent to assign "federal courts [the] plenary powers to secure compliance with Title VII"). Most notably, in 1974, the Court unanimously held in *Alexander v. Gardner-Denver* that an arbitration clause contained in a collective bargaining agreement could not bar a plaintiff from seeking Title VII remedies in federal court. "The purpose and procedures of Title VII," the Court explained, "indicate that Congress intended federal courts to exercise final responsibility for enforcement of Title VII; deferral [under any standard of review] to arbitral decisions would be inconsistent with that goal." *Id.* at 56. The Court unanimously reaffirmed this reasoning two years later in *Chandler v. Roudebush*, 425 U.S. 840 (1976), extending *Gardner-Denver* to cover federal employees, and again in 1984 in *McDonald v. City of West Branch*, 466 U.S. 284, 290 (1984), stating without qualification that *Gardner-Denver* established that arbitration "cannot provide an adequate substitute for a judicial proceeding in protecting the federal statutory" rights embodied in Title VII.

Prior to 1991, therefore, "[*Gardner-Denver*] was widely interpreted as prohibiting any form of compulsory arbitration of Title VII claims." *Prudential Ins. Co. v. Lai*, 42 F.3d 1299, 1303 (9th Cir. 1994) (collecting cases). Even as arbitration became increasingly popular in the 1980's, every circuit court to address the issue held firm in refusing to enforce any agreement — in the collective bargaining context or otherwise — that required employees to resolve discrimination claims through binding arbitration. *See, e.g.,*

Alford v. Dean Witter Reynolds, Inc., 905 F.2d 104, 105-08 (5th Cir. 1990); *Utley v. Goldman Sachs & Co.*, 883 F.2d 184, 185-87 (1st Cir. 1989); *Swenson v. Management Recruiters Int'l, Inc.*, 858 F.2d 1304, 1305-07 (8th Cir. 1988); *Rosenfeld v. Department of Army*, 769 F.2d 237, 239 (4th Cir. 1985); *EEOC v. Children's Hosp. Medical Ctr.*, 719 F.2d 1426, 1431 (9th Cir. 1983) (en banc) (Fletcher, J., concurring). The circuit courts read *Gardner-Denver* as sending a simple message: Title VII is different. Thus, while the Supreme Court espoused in other contexts a "liberal federal policy favoring arbitration," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), the Eighth Circuit held, in an opinion typical of those issued by the federal courts:

> Although [*Gardner-Denver*] involves a collective bargaining agreement, and not commercial arbitration under the FAA [Federal Arbitration Act, 9 U.S.C. §§ 1-14], this fact should not change the Court's analysis. The [*Gardner-Denver*] Court was well aware that federal policy favors arbitration. That decision turned not on the fact that a collective bargaining agreement was involved, but instead on the unique nature of Title VII claims.
>
> ....
>
> We conclude that in the passage of Title VII it was the congressional intent that arbitration is unable to pay sufficient attention to the transcendent public interest in the enforcement of Title VII.

Swenson, 858 F.2d at 1306-07; *see also Utley*, 883 F.2d at 187 (holding that in enacting Title VII Congress had "clearly" intended to preclude binding arbitration); *Rosenfeld*, 769 F.2d at 239 (stating that the "plain lesson" of *Gardner-Denver* is that Congress entrusted the final resolution of Title VII claims to the federal courts). As we succinctly put it a few years ago, *Gardner-Denver* simply "precluded Title VII cases from being subjected to compulsory arbitration." *Nghiem v. NEC Electronic, Inc.*, 25 F.3d 1437, 1441 (9th Cir. 1994).

In 1991, however, the Supreme Court held in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), that employees could be required under Form U-4 and NYSE Rule 347 to arbitrate age discrimination claims brought under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq.* Without discussing the similarities or differences between the ADEA and Title VII, the Court distinguished *Gardner-Denver* on the ground that it involved a collective bargaining agreement rather than an individual agreement to arbitrate. *See* 500 U.S. at 34-35. The Court reasoned that "[a]lthough all statutory claims may not be appropriate for arbitration," individual agreements to arbitrate such claims should be placed on the same footing as other individual arbitration agreements "unless Congress itself has evinced an intention [discoverable in a statute's text, legislative history, or through an inherent conflict between arbitration and the purpose of the statute] to preclude a waiver of judicial remedies for the statutory rights at issue." *Id.* at 24-26. Finding no such congressional intention evidenced by any inherent conflict between the ADEA's underlying pur-

poses and arbitration, the Court upheld the enforceability of Form U-4 in that circumstance.[4]

The Court's decision in *Gilmer* made it plain that its previous decisions finding arbitration generally inconsistent with the purposes of Title VII are now insufficient to "show[ ] that Congress in enacting Title VII intended to preclude arbitration of claims under the Act." *Mago v. Shearson Lehman Hutton Inc.*, 956 F.2d 932, 934 (9th Cir. 1992). In the post-*Gilmer* era, if courts are to hold that an act precludes arbitration of claims to which it gives rise, a more concrete showing is required, including a scrupulous examination of Congress' actions and intent. Further, in examining congressional legislation, it is now incumbent upon courts to consider whether Congress intended to preclude every form of arbitration of claims arising under a particular statute, or whether it intended to preclude only certain forms of arbitration agreements.

[1] Almost simultaneously with the Court's issuance of *Gilmer*, Congress enacted the Civil Rights Act of 1991, and, fortuitously, for the first time spoke directly to the arbitration of Title VII claims. While the Act was primarily designed to "overrule" hostile Supreme Court decisions in order to make discrimination claims easier both to bring and to prove in federal courts, and while it increased substantially the procedural rights and remedies

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[4]Gilmer argued only that there was an inherent conflict between the ADEA and arbitration and did not contend that the text or legislative history of the ADEA evinced a congressional intent to preclude arbitration. *See* 500 U.S. at 26.

available to Title VII plaintiffs in federal courts, it also stated that the parties could, "*[w]here appropriate and to the extent authorized by law*," opt to pursue alternative dispute resolution, including arbitration, to resolve their Title VII disputes. Pub.L. 102-166, § 118, *reprinted in* notes to 42 U.S.C. § 1981 (emphasis added).

In the wake of the 1991 Act, we have ruled that claimants who do not "knowingly" agree to arbitrate Title VII claims cannot be required to submit to arbitration. *See Prudential Ins. Co. v. Lai*, 42 F.3d 1299 (9th Cir. 1994), *cert. denied*, 116 S. Ct. 61 (1995). On the other hand, we also held in *Nghiem* that plaintiffs who "voluntarily initiate [ ] binding arbitration" of their Title VII claims are "bound by the arbitrator's decision." 25 F.3d at 1439-40. "Once a claimant submits to the authority of the arbitrator and pursues arbitration," we explained, "he cannot suddenly change his mind and assert lack of authority." *Id.* at 1440. We therefore rejected the argument that simply because the 1991 Act's amendments to Title VII provide for the right to jury trial, that right evinces a congressional intent to allow claimants to escape the binding effect of arbitrations that they initiated. See 25 F.3d at 1441. However, neither in *Nghiem* nor in any other prior case have we ever been required to consider the effect of the 1991 Act on the much more difficult question before us today: the enforceability of compulsory arbitration provisions that, as a condition of employment, compel persons to forego their statutory right to judicial relief with respect to future claims of Title VII discrimination, and to submit all such future claims to binding arbitration.

B

Duffield argues that Congress' intent to preclude the compulsory arbitration of Title VII claims is conclusively demonstrated in the text and/or legislative history of the Civil Rights Act of 1991, as well as by an examination of its purposes. That express congressional intent, Duffield contends, clearly serves to distinguish post-1991 Title VII claims from the pre-1990 ADEA claim that the Supreme Court found arbitrable in *Gilmer*.[5] The EEOC, in a Notice dated July 10, 1997 and in an *amicus* brief filed in this case, has adopted this same position.[6] We agree with

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[5]After the Supreme Court granted certiorari in *Gilmer*, Congress amended the ADEA to provide that *all* waivers of rights under the Act, apparently including the right to a jury trial, 29 U.S.C. § 626(c), must be "knowing and voluntary." *See* Older Workers Benefit Protection Act of 1990, Pub.L. 101-433, 104 Stat. 983 (1990); 29 U.S.C. § 626(f)(1); *Oubre v. Entergy Operations, Inc.*, 118 S. Ct. 838, 841 (1998). A waiver is not considered knowing and voluntary if the individual waives "rights or claims that may arise after the date the waiver is executed." 29 U.S.C. § 626(f)(1)(C). The Supreme Court did not, however, consider this new statutory language in *Gilmer*. Thus, current ADEA claims may require different treatment.

[6]We have never stated what level of deference is due a "notice," as opposed to a guideline or a policy statement, by the EEOC. The Supreme Court has generally advised that "the level of deference afforded will depend on the thoroughness evident in [the EEOC's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it

Duffield and the EEOC and hold that under the Civil Rights Act of 1991 employees may not be required, as a condition of employment, to waive their right to bring future Title VII claims in court.[7]

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power to persuade, if not control." *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 257 (1991) (internal quotations omitted). The import of the Court's statement seems to be that we should defer to "notices" insofar as they represent reasonable interpretations of Title VII. *See EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 115 (1988) (deferring to EEOC's position on issue that apparently was not formalized in any document outside of the litigation at issue because it represented a reasonable interpretation of Title VII). That is the procedure we have adopted regarding other agency's notices interpreting statutes under their jurisdiction, *see Alexander v. Glickman*, --- F.3d ---, ---, No. 96-17054, 1998 WL 125109, at *3-*4 (9th Cir. Mar.23, 1998), and that is the course we follow here.

[7]Because we hold that the 1991 Act precludes compulsory arbitration, we do not reach Duffield's claims that she did not knowingly agree to arbitrate her Title VII claims and that the NYSE arbitration system fails adequately to protect her statutory rights. While we have spoken previously in *Lai* and *Renteria v. Prudential Ins. Co.*, 113 F.3d 1104 (9th Cir. 1997), regarding the 1991 Act's "knowing" requirement, the parties in this case have emphasized the importance of the compulsory arbitration issue *in se*, and have vigorously contested that question throughout this proceeding. Likewise, several amici and the EEOC have urged that we determine the validity of compulsory arbitration provisions as applied to Title VII

As *Gilmer* pointed out, the standard governing the enforceability of arbitration agreements under the FAA is well established. "Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). The burden, therefore, is on Duffield to demonstrate that "Congress intended to preclude a waiver of a judicial forum for [Title VII] claims" in the manner mandated by Form U-4. *Gilmer*, 500 U.S. at 26. "If such an intention exists, it will be discoverable in the text of [the act at issue], its legislative history, or an 'inherent conflict' between arbitration and the [act's] underlying purposes." *Id.* at 26 (emphasis added); *accord Mitsubishi*, 473 U.S. at 628; *see also Block v. Community Nutrition Inst.*, 467 U.S. 340, 344 (1984) ("[A]ll presumptions used in interpreting statutes[ ] may be overcome by specific language or specific legislative history that is a reliable indicator of legislative intent.").

Congress declared as the 1990's dawned that "[n]ow — when more women and minorities are needed in the labor

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claims. Every amici, in fact, has addressed that issue, and we agree that the case is more appropriately resolved on that ground. Lastly, we need not consider Duffield's claim that Form U-4 is a contract of adhesion that is either unconscionable or beyond her reasonable expectations, *see Doctor's Assocs., Inc. v. Casarotto*, 116 S. Ct. 1652, 1656 (1996); *Graham v. Scissor-Tail, Inc.*, 28 Cal.3d 807, 817 (1981), because she makes that argument also only with respect to her Title VII (and FEHA) claims.

market to maintain the health and vitality of our economy — is the time to restore the strength of federal equal employment protection." H.R.Rep. No. 40(I), 102d Cong., 1st Sess. 15-16 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 553-54. It therefore drafted the legislation that became the Civil Rights Act of 1991. The Act had two primary goals: (1) to "restore . . . civil rights laws" by "overruling" a series of 1989 Supreme Court decisions that Congress thought represented an unduly narrow and restrictive reading of Title VII, *see id.* at 30; *Landgraf v. USI Film Prods.*, 511 U.S. 244, 250-51 (1994) (listing those decisions), and (2) to "strengthen" Title VII by making it easier to bring and to prove lawsuits, and by increasing the available judicial remedies so that plaintiffs could be fully compensated for injuries resulting from discrimination. Among other things, the 1991 Act provided for the first time a right to damages and to trial by jury and expanded Title VII's fee-shifting provisions. *See* H.R. Rep. No. 40(I) at 30; H.R. Rep. No. 40(II) at 1-4, 102d Cong., 1st Sess. 78 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 694-96.

In the context of the Act's significant enlargement of the substantive and procedural rights of victims of employment discrimination, Congress also included what Chief Judge Posner has termed "a polite bow to the popularity of 'alternate dispute resolution.'" *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 363 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 294 (1998). Section 118 of the 1991 Act provides that: "Where appropriate *and* to the extent authorized by law, the use of alternative means of dispute resolutions including, . . . arbitration is encouraged to resolve disputes arising under the Acts or provisions of Federal law

amended by this Title." Pub.L. 102-166, § 118, *reprinted in* notes to 42 U.S.C. § 1981 (emphasis added). Notwithstanding the inclusion of this innocuous-appearing section in a statute providing for a vast strengthening of employees' rights, Robertson Stephens argues that the plain language of the section evinces a congressional intent to allow — indeed, to "encourage" — the use of a process whereby employers condition employment on their prospective employees' agreeing to waive their rights to bring Title VII claims in federal (and state) court. By the time Congress passed the 1991 Act (but after it was drafted and reported out by the House Education and Labor Committee[8]), the argument goes, compulsory arbitration of all employment discrimination claims, including Title VII claims, was "authorized by law" — that is, by *Gilmer* — because the ADEA is similar to Title VII. Therefore, Robertson Stephens contends, compulsory arbitration must be included among the procedures that Congress intended to "encourage" in the 1991 Act.

We are the first circuit court to consider the "plain text" argument that Robertson Stephens makes in the context of an individual agreement that requires as a condition of

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[8]There was no Senate Committee Report, although another House Committee subsequently approved the identical bill without change. *See* H.R.Rep. No. 40(II) at 1, 102d Cong., 1st Sess. 78 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 694 (Judiciary Committee).

employment the arbitration of Title VII claims.[9] District courts have split on the question. *Compare Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, --- F. Supp. ----, No. Civ.A. 96-12267-NG, 1998 WL 81907 (D. Mass. Jan. 26, 1998) (holding that 1991 Act precludes compulsory arbitration of Title VII claims under Form U-4) *with Johnson v. Hubbard Broad., Inc.*, 940 F. Supp. 1447, 1457-58 (D. Minn. 1996) (reaching opposite conclusion despite noting indications to the contrary in the Act's legislative history) *and EEOC v. Frank's Nursery & Crafts, Inc.*, 966 F. Supp. 500, 504 (E.D. Mich. 1997) (holding that compulsory arbitration of Title VII claims, "notwithstanding the legislative history of [the 1991 Act], do[es] not violate federal law or policy"). Two circuits have accepted a version of Robertson Stephens' argument in cases involving significantly different circumstances. Both cases arose under the Americans with Disabilities Act (ADA), which has an arbitration section similar to the 1991 Act's.[10] The first case did not involve either an

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[9]The only other circuit opinions to address the enforceability of individual employment agreements containing prospective waivers of the right to bring Title VII claims in court since the 1991 Act became effective, do not, for various reasons, consider the effect of the Act. *See Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054 (11th Cir. 1998); *Cole v. Burns Int'l Security Servs.*, 105 F.3d 1465 (D.C. Cir. 1997); *Rojas v. TK Communications, Inc.*, 87 F.3d 745 (5th Cir. 1996).

[10]Section 12212 of the ADA, which was passed in 1990, tracks almost verbatim § 118 of the 1991 Civil Rights Act. *See* 42 U.S.C. § 12212. It also has a legislative history

employment agreement or a compulsory waiver, *see Bercovitch v. Baldwin School, Inc.*, 133 F.3d 141, 148-50 (1st Cir. 1998) (concluding that plain language of the ADA allows enforcement of voluntary, prospective agreement to arbitrate ADA claim against school), and the second, while it involved an employment contract, appears to have involved a voluntary agreement, *see Miller v. Public Storage Mgmt., Inc.*, 121 F.3d 215 (5th Cir. 1997) (enforcing arbitration clause to which the employee agreed at a performance review, while holding that the plain text of the ADA refutes the contention that "Congress did not intend for arbitration clauses to prevent individuals from bringing suit for ADA violations"). Those cases are readily distinguishable on their facts. There is a third and more troubling case, however — a case that involves a collective bargaining agreement and that conflicts directly with *Gardner-Denver*. *See Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 880-82 (4th Cir.) (holding that employees can be compelled to

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similar to § 118 of the 1991 Civil Rights Act, indicating that Congress intended to codify in the ADA the protections of the Court's holding in *Gardner-Denver*. *See, e.g.*, H.R. Conf. Rep. No. 596, 101st Cong., 2d Sess. 89 (1990), *reprinted in* 1990 U.S.C.C.A.N. 565, 598 ("It is the intent of the conferees that the use of these alternative dispute resolution procedures is completely voluntary."); H.R. Rep. No. 101-485(III) (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 499 (explaining that arbitration provision is intended to be consistent with *Gardner-Denver*); *see also infra* at 26-31 (describing the 1991 Act's legislative history). It is also noteworthy that the Court had not yet even decided *Gilmer* when the ADA was enacted.

submit ADA and Title VII claims to binding arbitration pursuant to collective bargaining agreement), *cert. denied*, 117 S. Ct. 432 (1996). In that case, a divided panel of the Fourth Circuit in fact flatly rejected *Gardner-Denver*, which in our view circuit courts are not free to do. *See Agostini v. Felton*, 117 S. Ct. 1997 (reaffirming that circuit courts must always follow directly binding Supreme Court decisions). The Fourth Circuit also ignored the reasoning of eight Justices on the subject of statutory analysis, relied on a separate opinion by Justice Scalia, and partially on the basis of that reasoning decided to disregard the legislative history of the 1991 Civil Rights Act. *See id.* at 882 (quoting *Thompson v. Thompson*, 484 U.S. 174, 188 (1988) (Scalia, J., concurring)).[11] We respectfully conclude that the Fourth Circuit simply misconstrued the controlling law.[12]

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[11]Interestingly, when the District of Minnesota held that the 1991 Act did not prevent employers from compelling the arbitration of Title VII claims under Form U-4, it used the same approach as the Fourth Circuit — that is, it ignored an opinion signed by eight Justices and relied solely on a lone concurrence by Justice Scalia to disregard the 1991 Act's Committee Reports. *See Johnson*, 940 F. Supp. at 1458 (citing *Blanchard v. Bergeron*, 489 U.S. 87, 98-99 (1989) (Scalia, J., concurring)).

[12]The Supreme Court recently granted certiorari in *Wright v. Universal Maritime Serv. Corp.*, 121 F.3d 702 (4th Cir. 1997) (table), *cert. granted*, 118 S. Ct. 1162 (1998), to consider whether the Fourth Circuit was correct in holding, in line with *Austin* but contrary to seven other circuits, that *Gardner-Denver* is no longer the law. *See* 66

[2] At the outset, we note that Robertson Stephens' construction of § 118 is at odds with Congress' directive to read Title VII broadly so as to best effectuate its remedial purposes. In passing the 1991 Act, Congress explicitly directed courts "that when the statutory terms in [Title VII] are susceptible to alternative interpretations, the courts are to select the construction which most effectively advances the underlying congressional purpose" of the Act. H.R. Rep. No. 40(I) at 88; *accord Dennis v. Higgins*, 498 U.S. 439, 443 (1991) (civil rights statutes should be construed broadly). The purpose of the Act was uniformly to *expand* employees' rights and "to *increase* the possible remedies available to civil rights plaintiffs." *Lai*, 42 F.3d at 1304 (emphasis added). It thus would be "at least a mild paradox," *Pryner*, 109 F.3d at 363, to conclude that in the very Act of which the "primary purpose" was "to strengthen existing protections and remedies available [to employees under Title VII]," H.R. Rep. No. 40(II) at 1, Congress "encouraged" the use of a process whereby employers condition employment on their prospective employees' surrendering their rights to a judicial forum for the resolution of all future claims of race or sex discrimination and force those employees to submit all such claims to compulsory arbitration.[13] It seems far

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U.S.L.W. 3571 (March 3, 1998); *Coleman v. Houston Lighting & Power Co.*, 984 F. Supp. 576, 582 (S.D. Tex. 1997) (listing circuits that disagree with the Fourth Circuit).

[13]It would also be at least a mild paradox to interpret § 118 as encouraging compulsory arbitration, when the sec-

more plausible that Congress meant to encourage *voluntary* agreements to arbitrate — agreements such as those that employers and employees enter into after a dispute has arisen because *both* parties consider arbitration to be a more satisfactory or expeditious method of resolving the disagreement.

Upon a careful reading of § 118 in context, moreover, it is difficult to escape the conclusion that the *text* of the section is, at a minimum, ambiguous — and that, at a maximum, it stands for a proposition that differs significantly from the one advanced by Robertson Stephens. When "examin[ing] the language of the governing statute," we must not be guided by "a single sentence or member of a sentence, but look[ ] to the provisions of the whole law, and to its object and policy." *John Hancock Mut. Life Ins. Co. v. Harris Trust & Savings Bank*, 510 U.S. 86, 94-95 (1993) (quoting *Kelly v. Robinson*, 479 U.S. 36, 43 (1986) (in turn quoting *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222 (1986) (other quotation marks and citations omitted))); *see also Bailey v. United States*, 116 S. Ct. 501, 506 (1995) ("We consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme."). That arbitration is "encouraged" obviously

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tion's other "encouraged" types of alternative dispute resolution — "settlement negotiations, conciliation, facilitation, mediation, factfinding, [and] minitrials" — are all consensual. Section 118; *see Babbitt v. Sweet Home Chapter*, 515 U.S. 687, 698 n.11 (1995) (stating that courts should, if possible, read a string of terms in a statute consistently so that they "reflect[ ] the broad purpose of the Act").

means only that parties are encouraged to arbitrate *within the statutory boundaries Congress contemplated*. Indeed, it would seem entirely disingenuous to fasten onto that one word and conclude that Congress was boundlessly in favor of all forms of arbitration, regardless of the desires or interests of the persons whose rights the Civil Rights Act of 1991 was designed to protect.

[3] The phrase "[w]here appropriate and to the extent authorized by law" is the critical statutory language; it provides the section's substantive limitations. While the phrase, if read out of context, is opaque, in the context of the statute and its "object and policy," *John Hancock*, 510 U.S. at 94-95, it tells us much about what Congress actually intended. For starters, following the Supreme Court, we are "reluctan[t] to treat statutory terms as surplusage." *Babbitt v. Sweet Home Chapter*, 515 U.S. 687, 698 (1995); *see also Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825, 837 & n.11 (1988) (citing cases holding same). We therefore presume that Congress' qualifiers of "where appropriate" and "to the extent authorized by law," § 118, set forth separate and distinct limitations on the conditions and circumstances under which the arbitration process may be invoked to resolve Title VII claims. *See Bailey*, 116 S. Ct. at 507 ("assum[ing] that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning"). The presence of the limiting phrase "where appropriate" at the very least refutes the argument that "to the extent authorized by law" means that Congress intended either to encourage *all* forms of arbitration or to encourage the use of arbitration under all conditions and circumstances that might otherwise be lawful. Rather, it seems clear that

Congress intended to encourage arbitration only under circumstances or conditions it deemed to be both legally permissible *and* appropriate.

[4] While the words "where appropriate," standing by themselves, give us little clue as to the circumstances under which Congress deemed arbitration to be "appropriate," or, as the dictionary defines the term, "proper, fitting" or "specially suitable," 1 The New Shorter Oxford English Dictionary 103, def'n 1 (4th ed. 1993), we can glean at least a reasonable understanding of Congress' intent from examining the purpose and objective of the 1991 Act, that purpose and objective being to expand employees' rights and remedies under Title VII. "Where appropriate," as used in the Act, would appear to mean where arbitration furthers the purpose and objective of the Act — by affording victims of discrimination an *opportunity* to present their claims in an alternative forum, a forum that *they* find desirable — not by forcing an unwanted forum upon them. *See, e.g., John Hancock*, 510 U.S. 86, 94-95 (1993) (courts should construe statutes guided by the "object and policy" of the whole law); *United States v. Qualls*, ___ F.3d ___, No. 95-50378, 1998 WL 149393, at *2 (9th Cir. Apr. 2, 1998) (en banc) (same).

[5] Likewise, § 118's other qualifier, the phrase "to the extent authorized by law," does not automatically lend itself to a fixed definition. It most likely codifies the "law" as Congress understood it at the time it either drafted or passed the provision. As the Supreme Court has stated, we should "examine initially" the statute "with an eye toward determining *Congress' perception of the law* that it was shaping or reshaping." *Thompson v. Thompson*, 484

U.S. 174, 180, 108 S. Ct. 513, 98 L.Ed.2d 512 (1988) (emphasis added); *see also Brown v. GSA*, 425 U.S. 820, 828, 96 S. Ct. 1961, 48 L.Ed.2d 402 (1976) (applying this principle to congressional amendments to Title VII). The overwhelming weight of the law at the time Congress drafted § 118, and it was reported out of the House Education and Labor Committee, was to the effect that compulsory agreements to arbitrate Title VII claims were unenforceable. In other words, such agreements were *not* "authorized by law." To the contrary, the law at that time prohibited employers from compelling employees to arbitrate Title VII claims pursuant to collective bargaining agreements, "in large part" because of the Court's recognition of the critical role that Congress envisioned for the independent federal judiciary in advancing Title VII's societal goal. *See McDonald*, 466 U.S. at 289; *Gardner-Denver*, 415 U.S. at 56. Although the Supreme Court had adopted in contexts outside of employment discrimination a "liberal federal policy favoring arbitration agreements," *Moses H. Cone*, 460 U.S. at 24, it had done even that only under the explicit assumption that these agreements constituted "freely negotiated choice-of-forum clauses." *Mitsubishi*, 473 U.S. at 628, 631; *see also, e.g., id.* (stating that "nothing . . . prevents a party from excluding statutory claims from the scope of an agreement to arbitrate"); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 483-84 (1989) (upholding agreement to arbitrate because it "broadened" plaintiff's right to select a forum for resolving disputes); *Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 479 (1989) ("Arbitration under the [FAA] is a matter of consent, not coercion."). Perhaps most important, as of the time § 118 was drafted

and reported out of the House Education and Labor Committee, the circuit courts, without exception, had "widely interpreted" Title VII as prohibiting "*any form* of compulsory arbitration," including in individual employment cases. *Lai*, 42 F.3d at 1303 (emphasis added); *see also supra* at 8-10 (gathering cases). Certainly when Congress wrote the 1991 Act, it could not have been expected to be better able than the circuit courts to predict the Supreme Court's narrowing of *Gardner-Denver*. *Cf. Thompson*, 484 U.S. at 180 (assuming Congress' view of the law to be the lower courts' consensus where the Supreme Court had not spoken to the contrary).

By the time the 1991 Act was actually passed, the law had become less clear. The Court's decision in *Gilmer* was issued just before the 1991 Act was officially enacted, leaving room for the possible inference that § 118 intended to codify that decision also. Yet even if such an inference might have been permissible under other circumstances, at the time the 1991 Act was enacted it was still at least an open question whether *Gilmer* applied to Title VII claims. The *Gilmer* opinion itself is silent regarding any comparison between Title VII and the ADEA. The ADEA shares many of the substantive provisions of Title VII, but its remedial and procedural provisions were originally modeled after the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*, not Title VII. *Lorillard v. Pons*, 434 U.S. 575, 578-84 (1978); *see also McKennon*, 513 U.S. 352, 357 (1995) (noting that even after the ADEA's enforcement was transferred to the EEOC its procedural provisions follow the FLSA and are distinct from those of Title VII). In fact, the Court had held that because of the "crucial" differences between the

procedural provisions in the ADEA and Title VII, any attempt to divine congressional intent in this area by comparing the two statutes "is misplaced." *Lorillard*, 434 U.S. at 584-85. While, in the absence of further guidance from Congress itself, there could be room for doubt over its intent with respect to the effect of the phrase "to the extent authorized by law" on Title VII's procedural rules, when the phrase is read in light of the other qualifying phrase and in light of the objectives and purposes of the 1991 Act it seems far more likely that Congress was referring to the *Gardner-Denver* line of cases than to *Gilmer*.

[6] Any doubt on this point, however, is resolved by even a cursory glance at § 118's legislative history. That history makes it clear that there is no need to hypothesize over whether Congress intended to include *Gilmer* within its definition of what was "authorized by law." It is evident from the legislative history that the answer to that inquiry is a resounding "no." Congress in no way intended to incorporate *Gilmer*'s holding into Title VII, or to authorize compulsory arbitration of Title VII claims. In fact, its clearly expressed intent was precisely the opposite.

The legislative history of § 118 unambiguously confirms that Congress sought to codify the law as it stood at the time the section was *drafted*, and eliminates any possibility that Congress intended to write *Gilmer* into Title VII law or to leave the question of which forms of arbitration were permissible to the whims and presumptions of future court decisions. Specifically, the committee reports and the floor statements describing § 118 — which we have already held in *Lai* demonstrate Congress' intent in passing the 1991 Act, *see* 42 F.3d at 1304-05 — plainly demon-

strate that in allowing arbitration only "[w]here appropriate and to the extent authorized by law" Congress intended to adopt *Gardner-Denver*'s firm rule precluding enforcement of compulsory agreements to arbitrate future Title VII claims, not *Gilmer*'s possible validation of such agreements. In fact, given the possible ambiguity in the literal language of the statutory phrases that relate specifically to arbitration, it is the unusual force and clarity of the statute's legislative history that is ultimately dispositive in this case.

[7] "In surveying legislative history, [the Supreme Court has] repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying the proposed legislation.'" *Garcia v. United States*, 469 U.S. 70, 76 (1984) (quoting *Zuber v. Allen*, 396 U.S. 168, 186 (1969)). This is especially true when, as in this case, the Committee reports were published before Congress' votes on the bill. The House Committee on Education and Labor, in its report on H.R. 1, the bill that became the Civil Rights Act of 1991, "explained that the purpose of [§ 118] was to *increase* the possible remedies available to civil rights plaintiffs." *Lai*, 42 F.3d at 1304. The Committee report states:

> The Committee emphasizes . . . that the use of alternative dispute mechanisms is . . . intended to supplement, not supplant, the remedies provided by Title VII. Thus, for example, the committee believes that any agreement to submit disputed issues to arbitration, whether in the context of

> collective bargaining or in an employment contract, *does not preclude the affected person from seeking relief under the enforcement provisions of Title VII*. This view is consistent with the Supreme Court's interpretation of Title VII in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S. Ct. 1011, 39 L.Ed.2d 147 (1974). The Committee does not intend this section to be used to preclude rights and remedies that would otherwise be available.

H.R. Rep. No. 40(I) at 97 (emphasis added), *quoted in Lai*, 42 F.3d at 1304. The Committee's explanation of § 118 echoed exactly the Conference Report's description of the same (verbatim) section in the Civil Rights Act of 1990, which President Bush vetoed for other reasons. In that report, the Conference Committee explained that "any agreement to submit disputed issues to arbitration . . ., in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of Title VII." H.R. Conf. Rep. No. 755, 101st Cong., 2d Sess. 26 (1990). These statements make it clear that even though *Gardner-Denver*'s literal holding applied only to collective bargaining agreements, Congress intended that the decision's rule against compulsory arbitration of Title VII claims be applicable to all "employment contract[s]." In other words, Congress concluded that all such mandatory agreements as conditions of employment were, at the very least, "inappropriate," and thus unenforceable.

[8] Lest there be any doubt as to the intended meaning of the Act's arbitration provision, Congress in fact *specifically rejected* a proposal that would have allowed

employers to enforce "compulsory arbitration" agreements. It did so in the most emphatic terms, explaining that:

> H.R. 1 includes a provision encouraging the use of alternative means of dispute resolution to supplement, rather than supplant, the rights and remedies provided by Title VII. The Republican substitute, however, encourages the use of such mechanisms "in place of judicial resolution." Thus, *under the latter proposal employers could refuse to hire workers unless they signed a binding statement waiving all rights to file Title VII complaints*. Such a rule would fly in the face of Supreme Court decisions holding that workers have the right to go to court, *rather than being forced into compulsory arbitration*, to resolve important statutory and constitutional rights, including equal opportunity rights. *See, e.g., Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *McDonald v. City of West Branch*, 466 U.S. 284 (1984). American workers should not be forced to choose between their jobs and their civil rights.

H.R. Rep. No. 40(I) at 104 (emphasis added). This rejection of the "Republican" proposal provides still further "strong evidence" of Congress' intent, *Thompson*, 484 U.S. at 185, to preclude compulsory arbitration of civil rights claims and to "encourage" only voluntary agreements — agreements that do not require potential employees to waive their right to litigate in a judicial forum as a mandatory condition of employment. This part of the Committee report also eliminates any possibility that § 118 was in any way a product of legislative compromise

that was not meant to advance the overall purposes of the Act.

That *Gilmer* turned out to undermine some of Congress' preferred Supreme Court decisions, of course, in no way alters Congress' expressed intent, in drafting § 118, to codify its position that "compulsory arbitration" of Title VII claims was not "authorized by law," and that compelling employees to forego their rights to litigate future Title VII claims as a condition of employment was not "appropriate." Indeed, Congress' reading of *Gardner-Denver* and *McDonald* was — as the Court remarked regarding Congress' understanding of a different facet of Title VII law that it amended -

> entirely reasonable. Whether [Congress'] understanding [of the law] was in some ultimate sense incorrect is not what is important in determining the legislative intent in amending the 1964 Civil Rights Act. . . . For the relevant inquiry is not whether Congress correctly perceived the state of the law, but rather what its perception of the law was.

Brown, 425 U.S. at 828 (footnote omitted); *see also Blanchard v. Bergeron*, 489 U.S. 87, 91-93 (1989) (holding that Congress codified the holdings of three cases when a Committee report cited those cases and said that they "correctly applied" its view of the law). And, as we have said many times before, so long as there is no constitutional infirmity, Congress' intended meaning of terms reigns supreme in the statutory arena. *See, e.g., Arriaga-Barrientos v. INS*, 937 F.2d 411, 414-15 (9th Cir. 1991) (holding that even if courts are "sympathetic" to a

policy argument contrary to a statute's requirements, "we lack the legitimate authority to undermine legitimate congressional will"). When Congress codifies the policy of certain of the courts' holdings, we are bound to follow the dictates of those cases regardless of whether we think they were correctly decided, and regardless of whether they are subsequently limited or overruled.

The Committee's view of § 118 was reiterated by key congressmen in the floor debates, who repeatedly stated that § 118 encouraged arbitration only "where parties knowingly and voluntarily elect to use those methods." 137 Cong. Rec. S15478 (daily ed. Oct. 30, 1991) (statement of Sen. Dole); *see also* 137 Cong. Rec. H9548 (daily ed. Nov. 7, 1991) (statement of Rep. Hyde) (explaining that § 118 encourages arbitration where "the parties knowingly and voluntarily elect" to submit to such procedures). The most informed and important statements were made by Representative Edwards, the Chairman of the House Committee on Education and Labor. Representative Edwards unequivocally explained during the debate immediately prior to the Act's passage that the provision was "intended to be consistent with . . . *Gardner-Denver*." 137 Cong. Rec. H9530 (daily ed. Nov. 7, 1991) (statement of Rep. Edwards). The Chairman added, so as to make the point perfectly clear:

> *This section contemplates the use of voluntary arbitration to resolve specific disputes after they have arisen, not coercive attempts to force employees in advance to forego statutory rights. No approval whatsoever is intended of the Supreme Court's*

> *recent decision in Gilmer . . ., or any application or extension of it to Title VII.*

Id. (emphasis added).[14] Finally, President Bush echoed Congress' understanding of the arbitration section in signing the Act, stating that "section 118 encourages *voluntary* agreements between employers and employees to rely on alternative mechanisms such as mediation and arbitration." Statement of the President of the United States, Signing Ceremony, Pub.L. No. 102-166 (Nov. 21, 1991), *reprinted in* 1991 U.S.C.C.A.N. 768, 769 (emphasis added). No statements were made in reports, on the floor, or by the President that contradicted this basic understanding.[15]

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[14]In view of Congress' repeated and unyielding pronouncements in the legislative histories of the ADA and the Civil Rights Act of 1991 that it sought to codify the Court's decision in *Gardner-Denver*, not *Gilmer*, we have some difficulty in understanding the Fourth Circuit's conclusion, after quickly discussing the Acts' legislative histories, that it "[does] not think that Congress intended to return to [*Gardner-Denver*]." *Austin*, 78 F.3d at 882. That conclusion is contrary to the import of every statement congressional committees and members of Congress made during the Acts' legislative processes and overlooks the fact that *Gilmer* was not even decided when the ADA was enacted.

[15]In fact, that Congress declined to allow agreements to arbitrate Title VII claims as a condition of employment is made even more clear by the dissenting views on the bill expressed in the Committee minority report (authored by Rep. Hyde). In discussing the arbitration provision, the

Robertson Stephens' principal response to the force of the Act's legislative history is that we should disregard entirely the evidence of Congress' intent and hold instead that, even though Congress did not *intend* to adopt *Gilmer*, the language of § 118 must be read as doing so.[16] Under Robertson Stephens' reading of § 118, the phrase "to the extent authorized by law" would be simply an elastic phrase, not expressly adopting or rejecting any Supreme Court case, but expanding and contracting with the ebb and flow of court decisions. Thus, Robertson Stephens would have us conclude that although § 118 was intended by its drafters, and understood by both the

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dissent lamented that, because § 118 encouraged only "voluntary" agreements, it was "nothing more than an empty promise" to those who wished to encourage arbitration of more Title VII claims. H.R. Rep. No. 40(II) at 78. If the arbitration provision had been thought to allow *ex ante* waivers as a condition of employment, there would have been absolutely no basis for the dissent's vigorous complaints.

[16]Robertson Stephens' other response to the legislative history is that even if it demonstrates that Congress intended to allow the enforcement only of "voluntary" agreements to arbitrate Title VII claims, Duffield's decision to sign Form U-4 was purely voluntary as that term is commonly understood. Whatever the merit of this dubious assertion, it is irrelevant here because our task is not to divine a literal meaning of the word "voluntary." Rather, it is to discover congressional intent. And, as we have explained in the text, Congress' intent was to preclude the enforceability of arbitration agreements imposed as a condition of employment.

Democratic and Republican members of both Committees that considered the bill, to preclude compulsory arbitration of Title VII claims — an intention unequivocally reiterated throughout the floor debates — the section, without a single word being changed, nevertheless was instantaneously transmogrified, and took on exactly the opposite meaning, on the day the Court's decision in *Gilmer* was announced. Any such "through the looking glass" construction would entail a gross perversion of the legislative process.

In essence, confronted with the legislative history, Robertson Stephens retreats to its "plain meaning" theory, urging us to construe the words "to the extent authorized by law" as encouraging the use of all lawful forms of arbitration at all times and under all circumstances. But "the meaning of statutory language, plain or not, depends on context." *Brown v. Gardner*, 513 U.S. 115, 118 (1994) (quoting *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991)). And, as we explained previously, the phrase's actual meaning, when viewed in the context of the remainder of the Act, is at the least ambiguous, and at the most quite different from that which Robertson Stephens urges. Robertson Stephens' argument ignores not only the purposes and objectives of the 1991 Act, but also the fact that the statute contains an express limitation in addition to the phrase "to the extent authorized by law" – the limitation "where appropriate" — which must be read along with it. Thus, even if an elastic interpretation of "to the extent authorized by law" would otherwise be reasonable, Robertson Stephens' construction would deprive the phrase "where appropriate" of any content whatsoever. If we are to give those additional words of limitation mean-

ing, as the Supreme Court tells us we must, *see, e.g., Bailey*, 116 S. Ct. at 507; *Babbitt*, 515 U.S. at 698, they must be construed as incorporating Congress' purposes and objectives as expressed in the 1991 Act, *see, e.g., John Hancock*, 510 U.S. at 94-95 (collecting cases holding that courts must interpret terms of statute consistent with the act's "object and policy") — namely, as increasing the rights and remedies afforded to victims of discrimination.

In the end, what is perhaps the most compelling reason for rejecting Robertson Stephens' argument is the specific instruction in *Gilmer* and several preceding arbitration cases to look to the statute's terms and to *"its legislative history,"* as well as its underlying purpose, in determining whether Congress "evinced an intention to preclude a waiver of judicial remedies" in the particular circumstances. *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi*, 473 U.S. at 628) (emphasis added); *accord Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226-27 (1987). Whatever role we should generally assign to legislative history, our duty when we try to discern whether Congress intended to preclude a waiver of a judicial forum with respect to claims arising under a particular statute is clear. Such an intent, the Court has expressly and repeatedly held, may be discerned in the text of the relevant act *or* in its legislative history, as well as in any inherent conflict between the statutory purposes and arbitration. *Id.* Not a single word in the 1991 Act's legislative history suggests that Congress intended to make the validity of requiring the arbitration of Title VII claims dependent on future court decisions. To the contrary, the legislative history of the Act makes it absolutely clear that Congress intended § 118 to codify the *Gardner-Denver* approach to compul-

sory arbitration agreements and to preclude the enforceability of such agreements with respect to Title VII claims. Congress "perce[ived] the state of the law," *Brown*, 425 U.S. at 828, as forbidding such agreements and, at the very least, viewed them as wholly "[in]appropriate." It specifically rejected a proposal that would have allowed them to be enforced. It thought, mistakenly or not, that the use of compulsory arbitration provisions would, in the House Committee's resounding and unequivocal words, "force[ ] American workers to choose between their jobs and their civil rights." H.R. Rep. No. 40(I) at 104. To force such a choice was certainly not the purpose or intent of Congress in passing the Civil Rights Act of 1991.[17]

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[17]We recognize that an argument can be made that by its preference for *Gardner-Denver*, Congress intended only to preclude the use of adverse arbitration awards as a bar to the prosecution of Title VII actions. We conclude, however, for the reasons set forth in the text, that Congress did not wish to force victims of discrimination to submit to compulsory arbitration if they preferred to assert their Title VII claims directly in a judicial forum. To the contrary, we believe it clear that Congress intended that Title VII claimants have the right to go straight to court. *See Pryner*, 107 F.3d at 364-65; *Varner v. National Super Markets, Inc.*, 94 F.3d 1209, 1213 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 946 (1997). Moreover, in this circuit we are precluded from adopting such a construction by *Nghiem*, in which we held that a Title VII claimant who voluntarily initiates arbitration proceedings is bound by an unfavorable award and may not thereafter seek to litigate his claim. *See* 25 F.3d at 1439-41.

[9] In view of the fact that "the context, language, and [legislative] history of" the 1991 Act "together make out a conclusive case," *Thompson*, 484 U.S. at 187, that Congress intended to preclude compulsory arbitration of Title VII claims, we think it inescapable that Form U-4 is unenforceable as applied to such claims. Form U-4 compels precisely what Congress intended to prohibit in the 1991 Act: mandatory requirements under which prospective employees agree as a condition of employment to surrender their rights to litigate future Title VII claims in a judicial forum and accept arbitration instead. Because every employer in the securities industry requires its employees to sign Form U-4, the form is especially violative of Congress' limitations. Form U-4 is a take-it-or-leave-it offer for anyone wishing to work anywhere in the United States as a broker-dealer in that industry. It forces individuals like Duffield to opt for one of two "choices": sign Form U-4 or seek another profession. This sort of dilemma is fundamentally at odds with a provision of the Civil Rights Act of 1991, § 118, that was intended to help deter employment discrimination by *increasing* claimants' choice of fora. *Cf. Bercovitch*, 133 F.3d at 150 (enforcing arbitration agreement between parents and school as applied to ADA claim because it was purely "voluntary," but suggesting that "involuntary" agreements, or agreements that individuals had no "influence over," would be unenforceable).

[10] In holding that Form U-4 is unenforceable as applied to Title VII claims, we do not, of course, mean to suggest that Congress sought in the 1991 Act to preclude employees from agreeing *after a claim has arisen* to submit

the dispute to arbitration.[18] Indeed, employees in many instances may believe that arbitration is preferable to protracted and expensive litigation and will willingly make that choice. Because of the legal community's recently increased faith in arbitration, those plaintiffs are now "encouraged" to resolve their employment disputes in that manner, and if they choose to do so, they are bound by the arbitrator's decision. *See Nghiem*, 25 F.3d at 1440. The contract before us, however, requires compulsory arbitration in every sense of the word, and it is contracts of that nature we are compelled to hold unenforceable under the Civil Rights Act of 1991.

We recognize that, as the Supreme Court has stated, agreements to arbitrate must generally be treated not as "forego[ing] the substantive rights afforded by [a] statute," but rather as merely changing the forum in which they are protected. *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi*, 473 U.S. at 628). Yet even assuming that the general federal policy in favor of arbitration would ordinarily apply to the compulsory arbitration of civil rights claims, we are not free to apply that policy here. Where Congress has manifested its intent, with regard to arbitration questions and otherwise, the Supreme Court has made it abundantly clear that the judiciary is not free to "legislate" its own contrary preferences. *See, e.g., Brogan v. United States*, 118

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[18]Furthermore, as we noted earlier, we express no view on the alternative procedure suggested in the proposed NASD rule change whereby individuals would be given the option at the time of employment to choose arbitration or litigation as the method of resolving future discrimination claims. *See supra* at 6 & n.1.

S. Ct. 805, 811-12 (1998) (stating that "[c]ourts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so"); *Negonsott v. Samuels*, 507 U.S. 99, 104 (1993) ("[A court's] task is to give effect to the will of Congress [when] its will has been expressed in reasonably plain terms."); *Gilmer*, 500 U.S. at 26 (directing courts to follow congressional intent in arbitration context); *Rodriguez de Quijas*, 490 U.S. at 483-84 (same). Whether or not permitting compulsory arbitration of Title VII claims is "more desirable than" the ban that Congress has imposed on such practice, "the proper venue for resolving that issue remains on the floor of Congress." *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 118 S. Ct. 956, 964 (1998). For now, at least, Congress has resolved the question in favor of preserving the right of victims of employment discrimination to seek their remedy in the federal courts.

III

Duffield also argues that she cannot be required to arbitrate her claims because the arbitration agreement imposes an unconstitutional condition of employment. This argument, unlike the one we have just considered, is applicable to her state tort and contract claims as well as to her claims that her civil rights have been violated. The argument is, in essence, that Form U-4 requires Duffield to forfeit her Fifth Amendment right to due process, her Seventh Amendment right to a jury trial, and her right to an Article III judicial forum. While this argument was not raised or addressed by the Court in *Gilmer*, it would, if meritorious, render Form U-4 unenforceable as applied to all of Duffield's underlying claims for relief. The district

court found it unmeritorious, holding that the essential prerequisite of state action was lacking. We agree.

[11] A threshold requirement of any constitutional claim is the presence of state action. This requirement, however, does not restrict the application of the Constitution solely to governmental entities. Private entities like the NYSE and the NASD may be held to constitutional standards if their actions are "fairly attributable" to the state. *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 936 (1982). The Supreme Court has established three criteria for satisfying this standard:

> First, [t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State. . . . The complaining party must also show that there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action may fairly be treated as that of the State itself. The purpose of this requirement is to assure that constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains.
> . . .
>
> Second, . . . a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed that of the State. Mere approval or acquiescence in the initiatives or a private party is not sufficient to justify

> holding the State responsible for those initiatives.
>
> . . .
>
> Third, the required nexus may be present if the private party has exercised powers that are traditionally the exclusive prerogative of the State.

Blum v. Yaretsky, 457 U.S. 991, 1004-05 (1982) (internal quotations and citations omitted). Duffield asserts that state action is independently present under each test. We do not agree.

A

Duffield's first argument is that state action is present because "federal law requires all broker-dealers to register with a national securities exchange (i.e., the NYSE or NASD), and to abide by the rules of that exchange — including its mandatory arbitration rules — as a condition of their continued employment." Appellant's Brief at 43. Robertson Stephens counters this argument by pointing out that federal law did not require broker-dealers to register with a national securities exchange until 1993, five years after Duffield signed her Form U-4. Therefore, it asserts, no federal law "required" Duffield to sign the form in 1988. Robertson Stephens is correct.

[12] The rules of NASD and the NYSE are not fairly attributable to the government unless they carry the force of federal law. And prior to 1993, no federal statute or regulation required Duffield to register with the securities exchanges, much less to sign Form U-4 or to arbitrate employment disputes. *See Association of Inv. Brokers v. SEC*, 676 F.2d 857, 861-62 (D.C. Cir. 1982). Thus, when Duffield signed her Form U-4 in 1988 and thereby waived

her rights to litigate employment-related disputes in a judicial forum, she did not do so because of any state action.[19]

[13] In 1993, however, the Securities and Exchange Commission (SEC) adopted a regulation that required all broker-dealers to be registered with at least one of the securities organizations of which Duffield's firm was a member — i.e., the NASD and the NYSE — before effecting any securities transaction. *See* 17 C.F.R. § 240.15b7-1 (adopted May 11, 1993). That registration regulation, like the SEC's registration regulation at issue in *Blount v. SEC*, 61 F.3d 938 (D.C. Cir. 1995), *cert. denied*, 116 S. Ct. 1351 (1996), "operates not as a private compact among brokers and dealers but as federal law." *Id.* at 941. Hence, to borrow *Blount*'s reasoning, as a government-mandated "condition to any participation in a . . . securities career," the current requirement that new employees register with a national securities exchange "constitutes government action of the purest sort." *Id.*

[14] Duffield attempts to take advantage of this new regulation by arguing that its registration requirement was

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[19]Duffield's attempt to skirt this fact by asserting that prior to 1993 she was required by NYSE Rule 345(a) to register with an exchange and that federal law obligated each exchange to enforce its own rules, see 15 U.S.C. § 78(g)(1), is unavailing. That a NYSE rule, rather than any federal mandate, required Duffield to register with the exchange, removes the government's "responsibility" for the imposition of the arbitration requirement. *See Blum*, 457 U.S. at 1004.

a governmentally imposed condition of her *continuing* employment and that Robertson Stephens did not invoke the arbitration clause until 1995 when it moved to compel arbitration. State action can be present, however, only to the extent that there is "a sufficiently close nexus between the State and the *challenged action*," *Jackson v. Edison Co.*, 419 U.S. 345, 351 (1974) (emphasis added); the action that Duffield challenges in her constitutional claims is the requirement that she waive her right to litigate employment-related disputes. Since agreements to arbitrate are "valid, *irrevocable*, and enforceable," 9 U.S.C. § 2 (emphasis added), to the same extent as any other contract, see *Gilmer*, 500 U.S. at 24, it is immaterial that years after Duffield signed her Form U-4 containing the arbitration provision, federal law required other employees like her to register with securities exchanges or even that it compelled her to remain registered. No federal law required Duffield to waive her right to litigate employment-related disputes by signing the Form U-4 in 1988, and no state action is present in simply enforcing that agreement. Insofar as Duffield argues that the "challenged action" is the requirement that she actually arbitrate her lawsuit, that requirement is found in her private contract, not in federal law.[20]

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[20]As described *supra* in note 1, the NASD recently has voted to abolish its mandatory arbitration requirement with regard to employment discrimination claims. If the SEC refuses to approve this change for some reason, then state action might be present, because the government would be exercising at the least "significant encouragement" over the private entity's actions. *Blum*, 457 U.S. at

B

[15] Duffield next argues that because the NYSE and NASD are required to obtain SEC approval before their rules may go into effect, *see* 15 U.S.C. §§ 78f(a), (b), 78o-3(a), (b), and because the SEC has exercised influence over such rules, the government may fairly be said to be encouraging the mandatory arbitration requirement. We previously have recognized that

> the [SEC] has virtually plenary authority over the arbitration procedures adopted by the national securities exchanges and securities associations. *See Shearson/American Express, Inc. v. McMahon*, 107 S. Ct. 2332, 2341 (1987). This authority includes the power to "abrogate, add to, and delete from" the arbitration rules adopted by such bodies if necessary or appropriate to protect rights created by the Securities Acts. *Id.*; 15 U.S.C. § 78s(c) (1982).

Cohen v. Wedbush, Noble, Cooke, Inc., 841 F.2d 282, 286 (9th Cir. 1988). We conclude here, however, that the SEC has not exercised sufficient influence over the compulsory arbitration requirement in Form U-4, the NASD procedures, or NYSE rules to deem that requirement the choice of the state.

The touchstone of state action in the context of governmental oversight is whether the government has moved

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1004-05. To date, however, the SEC has only acquiesced to NASD's and NYSE's mandatory arbitration rules. *See infra* section III.B.

beyond mere approval of private action into the realm of "encouragement, endorsement, and participation" of that action. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 615-16 (1989); *see also Blum*, 457 U.S. at 1004 (stating that state action is present when "the government has provided such significant encouragement, either overt or covert, that the [private party's] choice must be deemed that of the State"). The SEC has thus far failed to cross that line with regard to the NASD's and NYSE's compulsory arbitration requirements. "To begin with the obvious, there is nothing in the [Securities Exchange Act of 1934] and there is no Commission rule or regulation that specifies arbitration as the favored means of resolving employer-employee disputes." *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 135-36 (1973). No SEC rule or action that has been called to our attention encourages the NASD or the NYSE to compel arbitration. This puts the role of the SEC in a critically different light than that of the Federal Railroad Administration in *Skinner*, which drafted regulations making plain its "strong preference for [drug] testing," explicitly conferred on railroads the authority to conduct such tests, required railroads and employees to perform such tests, and codified its right to receive certain biological samples. *See* 498 U.S. at 615.

[17] The SEC's role to date of approving the exchanges' rules and conducting oversight of their procedures has been no more aggressive than that of the Public Utilities Commission in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). In that case, a private utility was required by the state's regulatory scheme to obtain approval of its business practices from the utility commission. When

those practices were challenged, the Court declined to find state action, reasoning that "where the commission has not put its weight on the side of the proposed practice by ordering it, . . . [its] failure to overturn this practice" does not make its action "state action" for purposes of constitutional inquiries. *Id.* at 357. Duffield has pointed to numerous instances of the SEC's oversight and development of the exchanges' arbitration rules and procedures, but she has failed to put forth any example of governmental encouragement or endorsement of the compulsory arbitration requirement itself. Thus, the SEC's involvement is insufficient under *Skinner*, *Blum*, and *Jackson* to render the industry's overall requirement that its employees submit to arbitration in lieu of court proceedings fairly attributable to the state.

C

[18] Duffield's last argument is that the NASD and NYSE are invoking governmental authority because through their arbitration system they are "perform[ing] the government function of enforcing and adjudicating Title VII." Appellant's Brief at 53. This argument is contrary to the established law of this circuit. We have long held that, since dispute resolution is not an "exclusive" governmental function, neither private arbitration nor the judicial act of enforcing it under the FAA constitutes state action. *See, e.g., FDIC v. Air Florida Sys., Inc.*, 822 F.2d 833, 842 n.9 (9th Cir. 1987). The 1991 Civil Rights Act's allowance of voluntary, private arbitration agreements forecloses the assertion that civil rights statutes should be exempted from this general rule.

IV

Duffield has met her burden of showing that Congress intended in enacting the Civil Rights Act of 1991 to preclude the compulsory arbitration of Title VII disputes. Form U-4 is, therefore, unenforceable with respect to her Title VII and FEHA claims. Because no state action was involved in Duffield's mandatory waiver, however, there is no constitutional bar to enforcing Form U-4 with respect to her state tort and contract claims. Accordingly, the district court's order compelling arbitration is AFFIRMED IN PART and REVERSED IN PART. The district court's denial of Duffield's motion for summary judgment on her declaratory relief claim is AFFIRMED IN PART and REVERSED IN PART. The case is REMANDED for further proceedings consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

APPENDIX B

[Stamped:
FILED
AUG 26 1996
RICHARD W. WIEKING, CLERK]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

TONJYA DUFFIELD, Plaintiff, vs. ROBERTSON, STEPHENS & COMPANY, a partnership; and ROBERTSON, STEPHENS & COMPANY, a corporation, Defendants.	No. C-95-109 EFL ORDER VACATING AND MODIFYING ORDER OF AUGUST 6, 1996

On August 16, 1996, plaintiff filed an expedited motion for leave to file a motion for correction and reconsideration of the August 6, 1996 order denying plaintiff's motion for summary judgment and denying certification under 28 U.S.C. § 1292(b). This motion raises the following two issues: (1) the August 6, 1996 order mistakenly included language which appears to decide an issue which was not present before the Court, namely, whether plaintiff "knowingly" entered into the agreement to arbitrate under Prudential Insurance Co. v. Lai, 42 F.3d 1299 (9th Cir. 1994); and (2) whether the denial of 28 U.S.C. § 1292(b) certification should be reconsidered.

After having considered all of papers filed regarding the August 16, 1996 expedited motion, the Court finds that the August 6, 1996 order does inadvertently contain some language which appears to decide the "knowingly" issue. Accordingly, the Court hereby ORDERS that the August 6, 1996 order is VACATED and MODIFIED by the present order.

And as for the 28 U.S.C. § 1292(b) certification issue, the only new argument presented is that it would be inefficient to litigate the "knowingly" issue. The Court is not persuaded. Moreover, defendants are of the opinion that, "the 'knowingness' issue can be resolved on undisputed facts." Defendants' response filed August 21, 1996 at 2. Accordingly, the logical next step would be for the defendants to move for summary judgment on the "knowingly" issue. Defendants should either file this motion or set up a status conference with this Court within 30 days of the date of this order. For these reasons, the Court hereby ORDERS that plaintiff's expedited motion for leave to file motion for correction and reconsideration is DENIED.

I. INTRODUCTION

Plaintiff, a securities broker-dealer formerly employed by defendant Robertson, Stephens & Company ("defendant"), filed this complaint on January 11, 1995 claiming Title VII and FEHA sexual discrimination and sexual harassment, breach of contract, deceit, intentional infliction of emotional distress, and negligent infliction of emotional distress. As a threshold matter, the issue of whether plaintiff is bound to pursue these claims in arbitration must be decided. After extensive discovery, plaintiff has moved for partial summary judgment regarding her claim for declaratory relief which seeks to have the arbitration clause declared unenforceable. After having considered all of the pleadings and papers filed in regards to this motion, as well as the oral arguments presented by counsel at the June 6, 1996 hearing, the Court denies plaintiff's motion for partial summary judgment.

II. BACKGROUND

Plaintiff was employed by defendant as a securities broker-dealer from June 1988 to April 1994. Defendant is a member of the New York Stock Exchange ("NYSE") and the National Association of Securities Dealers ("NASD"), both of which are private corporations. As a condition of her employment, defendant required plaintiff to register with a national securities exchange by signing a Uniform Application for Securities Industry Registration or Transfer, which is commonly known as a Form U-4. On June 20, 1988, plaintiff did in fact complete and sign a Form U-4 which contained the following arbitration clause:

> I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required

> to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register, as indicated in item 10 as may be amended from time to time.

Declaration of Michael Rubin, Exh. G at 4.

The NYSE requires its member organizations and their employees to arbitrate their disputes at the request of either party to the dispute.[1] Although NASD also requires the employment disputes of its members to be submitted to arbitration, the briefs have focused on the NYSE Rules, and therefore so will this Order. See Defendant's Request for Judicial Notice, Exh C. On March 1, 1996, plaintiff stipulated for purposes of this motion only that she knew that "by executing a Form U-4 upon commencement of her employment with defendant . . . she would be required to arbitrate claims such as the ones she asserts in the present action." Stipulation and Order filed March 1, 1996 at 1.

The present motion is based on plaintiff's argument that the arbitration requirement is unenforceable because it (1) imposes an unconstitutional condition on her employ-

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[1] NYSE Rule 347 states:

> Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules.

Defendant's Request for Judicial Notice, Exh. B.

ment, (2) does not adequately protect her rights under Title VII, and (3) was not entered into knowingly and voluntarily. Because the Court only took the first argument under submission, the second and third arguments will only be discussed briefly. Transcript of June 6, 1996 Proceedings filed July 2, 1996 at 17.

III. DISCUSSION

A. UNCONSTITUTIONAL CONDITION

1. STATE ACTION

It is fundamental and undisputed that the United States Constitution usually limits only the actions of the federal and state government, and not the actions of private entities. See Edmonson v. Leesville Concrete Co., 500 U.S. 614, 619-20 (1991). As the Ninth Circuit recently noted:

> While we sometimes treat acts of private parties as public, we do so sparingly. "Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power." Lugar v. Edmonson Oil Co., 457 U.S. 922, 936 (1982).

Mathias v. Pacific Gas and Electric Co., 75 F.3d 498, 501 (9th Cir. 1996). In the simplest terms, the state action requirement is a test used to determine when private entities should be held to constitutional standards. Due to the fact that defendant, as well as the NYSE and the NASD, are private entities, plaintiff is forced to argue that state action is present in this case. However, the Court is not persuaded.

Although the United States Supreme Court has employed various formulations of the state action requirement over the years, the basic principal remains clear and

unchanged.[2] In Blum v. Yaretsky, 457 U.S. 991, 1004-05 (1982), the Supreme Court clearly and thoroughly set forth the state action requirement:

> First, . . . "[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment." The complaining party must also show that "there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of latter may fairly be treated as that of the State itself." . . .
>
> Second, . . . a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State. Mere approval of or acquiescence in the initiatives of a

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[2] Justice O'Connor recently observed that:

> [W]e have variously characterized the inquiry as whether "there is a sufficiently close nexus between the State and the challenged action," Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974); whether the state, by encouraging the challenged conduct, could be thought "responsible for those actions," Blum v. Yaretsky, 457 U.S. 991, 1005 (1982); and whether "the alleged infringement of federal rights [is] 'fairly attributable to the State,'" Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982).

Lebron v. National R.R. Passenger Corp., 115 S. Ct. 961, 979 (1995) (O'Connor, J., Dissenting) (emphasis in original).

> private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment.
>
> Third, the required nexus may be present if the private entity has exercised powers that are "traditionally the exclusive prerogative of the State."

Id. at 1004-05 (citations omitted).

In the present case, plaintiff asserts that state action exists because (1) federal statutory and regulatory law required the plaintiff to register with a securities exchange (e.g., NYSE) and agree to its mandatory arbitration clause and (2) the Securities and Exchange Commission ("SEC") plays a substantial role in developing, reviewing, and approving the securities exchanges' (e.g., NYSE) rules.[3]

a.REQUIREMENTS OF FEDERAL LAW

Quite simply, the first argument is based on a false premise. In 1988 when plaintiff agreed to the arbitration clause, there was absolutely no federal statute or regulation which required her to register with an exchange.

Plaintiff attempts to rely on 15 U.S.C. § 78o(b)(8) which states:

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[3] In footnote 12 of her opening brief, plaintiff also asserts two secondary grounds for a finding of state action; (1) the public function doctrine and (2) Cohen v. Cowles Media Co., 501 U.S. 663 (1991). Plaintiff's Motion for Partial Summary Judgment filed November 2, 1995 at 10-11 n. 12. Although these arguments were presently in cursory fashion, the Court has considered them. The Court hereby finds neither of these arguments sufficient to establish state action in the present case.

> It shall be unlawful for any registered broker or dealer to effect any transaction in . . . any security . . . unless such broker or dealer is a member of a securities association registered pursuant to section 78o-3 of this title or effects transactions in securities solely on a national securities exchange of which it is a member.

But as defendant points out and plaintiff effectively concedes in its reply brief, 15 U.S.C. § 78o(b)(8) applies only to broker-dealer firms and individuals who are not associated with a firm. In addition, 15 U.S.C. § 78o(a)(1) clearly indicates that only broker-dealer firms and individual broker-dealers who are not associated with a firm are required to register.[4] Because plaintiff was associated with a registered broker-dealer firm (i.e., the defendant), 15 U.S.C. § 78o(b)(8) does not apply to him. See Roth v. Securities and Exchange Commission, 22 F.3d 1108, 1109 (D.C. Cir. 1994).

Although 17 C.F.R. § 240.15b7-1 (enacted May 11, 1993) does currently require that individual broker-dealers register with the securities exchanges of which their firms are members, this Securities and Exchange Commission

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[4] 15 U.S.C. § 78o(a)(1) states:

> It shall be unlawful for any broker or dealer which is either a person other than a natural person or a natural person not associated with a broker or dealer which is a person other than a natural person . . . to make use of the mails or any means or instrumentality of interstate commerce to effect any transactions in . . . any security . . . unless such broker or dealer is registered in accordance with subsection (b) of this section.

Rule was not in effect at the time plaintiff agreed to the arbitration clause in the Form U-4 as a condition of her employment with defendant. Plaintiff complains that the arbitration clause was an unconstitutional condition of her employment. Accordingly, the state action analysis must focus on 1988, the year in which plaintiff agreed to the arbitration clause at issue. And in 1988, there was absolutely no federal statute or regulation which required her to agree to mandatory arbitration. Moreover, federal law did not even require her to register with a securities exchange.

And finally, the Court will address two cases, R.J. O'Brien & Assoc., Inc. v. Pipkin, 64 F.3d 257 (7th Cir. 1995) and Blount v. Securities and Exchange Commission, 61 F.3d 938 (D.C. Cir. 1995), on which the plaintiff relied heavily at oral argument.[5] Both of these cases are easily distinguishable.

In R.J. O'Brien, the Seventh Circuit addressed, but rejected a constitutional challenge to the arbitration procedures of the National Futures Association ("NFA"). The NFA is a private corporation registered under the Commodity Exchange Act, 7 U.S.C. §§ 1-25, which has been delegated the registration function by the Commodity Futures Trading Commission ("CFTC"), which is an independent government agency created by Congress. The R.J. O'Brien court did not even undertake a traditional state action analysis, because the NFA was held to be a "government actor in performing the registration function." R.J. O'Brien, 64 F.3d at 262. In addition,

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[5] In spite of their emphasis at oral argument, plaintiff's only discussion of R.J. O'Brien and Blount in the written briefs consists of a single sentence on page 3 of their May 28, 1996 reply brief.

participants in the commodity futures industry are required by federal statute to register with the NFA. 7 U.S.C. §§ 6f(a), 6k(1). The present case must be distinguished because the NYSE is not a government actor and plaintiff was not required by federal law to register.

Similarly, the present case must also be distinguished from Blount, 61 F.3d 938. In Blount, the District of Columbia Circuit considered, but rejected a constitutional challenge to a Municipal Securities Rulemaking Board ("MSRB") rule which limited the political contributions of municipal securities broker-dealers. Instead of deciding whether the MSRB was a private organization or not, the Blount court focused on 15 U.S.C. § 78o-4(a)(1) which requires broker-dealers in municipal securities to register. Id. at 941. Once again, the present case must be distinguished because at the time plaintiff registered, she was not required to do so by federal law.

b. ROLE OF SEC

Plaintiff's second argument regarding state action relies on the role of the SEC in developing, reviewing, and approving the rules of securities exchanges, such as the NYSE arbitration clause. In other words, plaintiff asserts that the SEC "has provided such significant encouragement, either overt or covert, that the choice [of the NYSE to require arbitration] must in law be deemed to be that of the State." Blum v. Yaretsky, 457 U.S. at 1004.

Plaintiff relies on various statutes which set forth the SEC's role regarding the rules of the securities exchanges. 15 U.S.C. § 78s(b)(1) requires all securities exchanges to submit proposed rules and proposed rule changes with the SEC. Unless the proposal merely formalizes an established policy or solely concerns the administration of the exchange, it will not take effect until it is affirmatively

approved by the SEC. 15 U.S.C. § 78s(b)(1), (3)(A). Specifically, the parties do not dispute that the mandatory arbitration rules have been discussed and reviewed by the SEC as part of its general oversight responsibilities. Assuming all of this to be true, the Court concludes that the SEC's role is insufficient to find state action. This appears to be the type of basic regulatory scheme in which the "[m]ere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible . . . ." Blum v. Yaretsky, 457 U.S. at 1004.

Plaintiff also attempts to go the next step and establish that the SEC actually encouraged or coerced the exchanges to adopt the mandatory arbitration policy currently in dispute. However, the evidence does not support this position. While plaintiff's evidence does indicate that many of the proposed rule changes regarding arbitration procedures over the last two decades were generated in response to statements from the SEC, there is absolutely no evidence that the rules which require arbitration were encouraged or coerced by the SEC. The state action requirement is met "only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains." Id.; see also Rendell-Baker v. Kohn, 457 U.S. 830, 841 (1982). The specific conduct about which plaintiff now complains is that she is required to submit her claims to arbitration.

In addition to the lack of evidence that the SEC encouraged or coerced the exchanges into requiring arbitration of employment disputes, it should be noted that the NYSE has required arbitration of disputes between its member firms and their employees since as early as 1958. However, the SEC did not receive the power and authority to review the employment arbitration rules of

the exchanges until 1975. See Merrill Lynch Pierce, Fenner & Smith v. Ware, 414 U.S. 117, 135 n. 14 (1973). In other words, at the time the NYSE actually made the decision to institute mandatory arbitration, the SEC lacked the power to even review such a decision.

And finally, plaintiff argues that the involvement of the SEC in the development of the Form U-4 also indicates that state action is present. The Court is not persuaded. The Form U-4 is simply a means to facilitate simultaneous registration with more than one exchange. By itself, the Form U-4 does not require arbitration. Rather, it only requires that the individual broker-dealer abide by the arbitration procedures of the exchanges with which he or she is registering. Declaration of Michael Rubin, Exh. G at 4.

c. CONCLUSION

At the time plaintiff registered with the NYSE and thereby agreed its arbitration rules, federal law did not require her to so register. Because the NYSE's decision to require arbitration did not involve any encouragement or coercion by the SEC, the Court finds the SEC's role to be one of basic regulation and "mere approval." Blum v. Yaretsky, 457 U.S. at 1004. For these reasons, the Court concludes as a matter of law that there is no state action present in this case.[6]

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[6] Accordingly, the Court does not reach the issue of whether arbitration clause constitutes an unconstitutional condition.

B. INADEQUATE PROTECTION OF TITLE VII RIGHTS

Plaintiff's second basis for her motion for summary judgment is that the arbitration clause cannot be enforced because it does not adequately protect her Title VII rights. See Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991); Graham Oil Co. v. ARCO Products Co., 43 F.3d 1244, 1247 (9th Cir. 1994). Plaintiff cites her extensive discovery regarding the detailed procedural workings of the NYSE arbitration program. For instance, one of plaintiff's complaints is that she cannot adequately vindicate his Title VII rights because The Arbitrators Manual instructs that:

> Arbitrators are not strictly bound by case precedent or statutory law. Rather, they are guided in their analysis by the underlying policies of the law and are given wide latitude in their interpretation of legal concepts.

Declaration of Michael Rubin, Exh. A-1 at 26.

In addition to disputing plaintiff's ultimate conclusion that the NYSE arbitration scheme does not allow plaintiff to effectively vindicate her Title VII rights, defendant also focuses on the actual holdings of Gilmer and Graham Oil. In Gilmer, the Supreme Court considered and rejected numerous challenges to the adequacy of the very same NYSE arbitration procedures at issue in the present case. Gilmer, 500 U.S. at 30-32.

In Graham Oil, the Ninth Circuit held that although a simple agreement to arbitrate disputes is valid, the agreement in that case is invalid because it contained the express forfeiture of specific statutory rights. Graham Oil, 43 F.3d at 1247-48. In contrast, there is no forfeiture of

specific statutory rights in the present case and therefore, the arbitration clause is valid.

After considering the entire record, including the arguments of counsel at the June 6, 1996 hearing, the Court concludes that the NYSE arbitration scheme does adequately protect plaintiff's Title VII rights.

C. KNOWING AND VOLUNTARY

Plaintiff's final argument that the arbitration clause is unenforceable is that based on extension of Prudential Insurance Co. v. Lai, 42 F.3d 1299 (9th Cir. 1994). In Prudential, the Ninth Circuit ruled that, "a Title VII plaintiff may only be forced to forego her statutory remedies and arbitrate her claims if she has knowingly agreed to submit such disputes to arbitration." Id. at 1305. However, in the present motion, plaintiff does not argue that she unknowingly agreed to arbitrate, but rather that the agreement was involuntary. Plaintiff concedes that Prudential does not explicitly state that an agreement to arbitrate must be voluntary, but instead argues that it should be so extended based on the legislative history.

After having considered the entire record, including those presented by counsel at the June 6, 1996, the Court refuses to extend Prudential to require that Title VII plaintiffs may only be forced to arbitrate if they voluntarily agreed to do so.

D. PLAINTIFF'S REQUEST FOR 28 U.S.C. § 1292

At the end of the June 6, 1996 hearing, plaintiff requested that in the event that her motion is denied that the Court certify the order for interlocutory appeal under 28 U.S.C. § 1292(b). Because the Court finds that there is not a "substantial ground for difference of opinion" and an immediate appeal would not "materially advance the

ultimate termination of the litigation," plaintiff's request for 28 U.S.C. § 1292(b) is denied.

IV.CONCLUSION

For the above stated reasons, the Court hereby ORDERS that:

(1)Plaintiff's motion for summary judgment is DENIED; and

(2)Plaintiff's request for 28 U.S.C. § 1292 certification is DENIED.

IT IS SO ORDERED

DATED: AUG 26 1996.

/s/
EUGENE F. LYNCH
United States District Judge

APPENDIX C

[Stamped:
FILED
MAR 13 1997
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

TONYJA DUFFIELD, Plaintiff, vs. ROBERTSON, STEPHENS & COMPANY, a partnership; and ROBERTSON, STEPHENS & COMPANY, a corporation, DOES 1-50, inclusive, Defendants.	No. C-95-109 EFL ORDER

I. INTRODUCTION

On January 11, 1995, plaintiff, a securities broker-dealer formerly employed by defendant Robertson, Stephens & Company, filed a complaint claiming Title VII and FEHA sexual discrimination and sexual harassment, breach of contract, deceit, intentional infliction of emotional distress, and negligent infliction of emotional distress. Plaintiff primarily brings this action to challenge the

arbitration of Title VII claims in the securities industry. As a result, the primary focus of this litigation has been on plaintiff's first cause of action for declaratory relief. Plaintiff seeks a declaratory judgment which states that she and other security industry employees cannot be compelled to arbitrate their Title VII claims pursuant to the arbitration provisions in Form U-4 agreements.

On September 30, 1996, defendant Robertson, Stephens & Company filed a motion to compel arbitration and to stay litigation. Defendant contends that plaintiff knowingly agreed to arbitrate all disputes arising from her employment and that no legal constraints external to the arbitration agreement foreclose arbitration of the plaintiff's claims.

Plaintiff responds that the agreement to arbitrate was not made knowingly and that it is unenforceable as a contract of adhesion. In addition, plaintiff asks that, if the Court grants defendant's motion to compel, the Court enter judgment on plaintiff's first cause of action for declaratory judgment pursuant to Fed. R. Civ. P. 54(b).

At the February 7, 1997 hearing in this matter, the Court held that plaintiff must arbitrate all her claims because she knowingly entered into a binding arbitration agreement by signing a Form U-4 agreement. However, the Court took under submission the plaintiff's request for entry of final judgment on her first cause of action.

Subsequently, plaintiff filed a citation of new authority and a request for reconsideration.

After considering all the papers filed in connection with these motions and the oral arguments of counsel, the Court GRANTS defendant's motion to compel arbitration and DENIES plaintiff's request for reconsideration. The Court also DECLINES to enter judgment against the

plaintiff on the plaintiff's first cause of action for declaratory judgment pursuant to Rule 54(b). However, the Court has decided to CERTIFY this Order and the Court's August 26, 1996 Order for immediate appeal under 28 U.S.C. § 1292(b).

II. BACKGROUND

A. Factual Background

Plaintiff was employed by defendant as a securities broker-dealer from June 1988 to April 1994. Defendant is a member of the New York Stock Exchange ("NYSE") and the National Association of Securities Dealers ("NASD"). As a condition of her employment, plaintiff was required to register with a national securities exchange by signing a Uniform Application for Securities Industry Registration or Transfer, which is commonly known as a Form U-4. On June 20, 1988, plaintiff did in fact complete and sign a Form U-4 which contained the following arbitration clause:

> I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register, as indicated in item 10 as may be amended from time to time.

The NYSE requires its member organizations and their employees to arbitrate their disputes at the request of either party to the dispute. NYSE Rule 347 states:

> Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by

> and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules.

After plaintiff signed the Form U-4 and began working for defendant, the parties engaged in negotiations which were intended to produce a written employment contract. In July 1988, defendant submitted a proposed contract which provided defendant with the option of requiring any employment dispute to be submitted to arbitration. Plaintiff who was represented by an attorney proposed several changes to the contract including elimination of a mandatory arbitration provision. However, the negotiations were never completed, and no employment contract was reduced to writing.

B. Procedural Background

On November 2, 1995, plaintiff moved for partial summary judgment on her declaratory relief claim. Plaintiff's motion asserted that the alleged arbitration agreement between the parties was unenforceable because it (1) imposed an unconstitutional condition of her employment, (2) did not adequately protect her rights under Title VII, and (3) was not entered into knowingly and voluntarily.

The Court issued on August 26, 1996 Order rejecting plaintiff's arguments.[1] The Court held that, as a matter of law, there is no state action involved in compelling plaintiff to file a Form U-4. Therefore, requiring employees to sign Form U-4s as a condition of employment does not constitute an unconstitutional condition of

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[1] The August 26, 1996 Order vacated and modified an earlier August 6, 1996 Order.

employment. In addition, the Court held that the NYSE arbitration scheme does adequately protect plaintiff's Title VII rights. Finally, the Court refused to extend the holding in Prudential Ins. Co. of America v. Lai, 42 F.3d 1299 (9th Cir. 1994). In Lai, the Ninth Circuit held that unknowing agreements to arbitrate Title VII claims were not enforceable. Id. at 1305. This Court refused to extend Lai "to require that Title VII plaintiffs may only be forced to arbitrate if they voluntarily agreed to do so." (Order Vacating and Modifying Order of August 6, 1996 at 14.)

The Court expressly did not rule on whether the plaintiff knowingly entered into an agreement to arbitrate her claims because this issue was not before the Court.

III. DISCUSSION

A. Motion to Compel Arbitration

Since it is undisputed that plaintiff signed a Form U-4 which contained an agreement to arbitrate, plaintiff must establish that the arbitration agreement is unenforceable in order to avoid arbitration of her substantive claims. See 9 U.S.C. § 2.

Defendant contends that the Court's August 26, 1996 Order resolved all issues concerning enforceability of the arbitration agreement except whether plaintiff knowingly agreed to arbitrate employment disputes within the meaning of Lai. Defendant asserts that plaintiff did knowingly agree to arbitration within the meaning of Lai.

Plaintiff responds that plaintiff did not knowingly enter into the arbitration agreement. In addition, plaintiff's opposition raises a contract of adhesion argument as an alternative basis for challenging the enforceability of the arbitration agreement.

1. Knowing Agreement

In their respective arguments, the parties rely on different interpretations of the term "knowingly" as it is used in the Lai opinion. In Lai, the Ninth Circuit held that, "a Title VII plaintiff may only be forced to forego her statutory remedies and arbitrate her claims if she has knowingly agreed to submit such disputes to arbitration." Lai, 42 F.3d at 1305. Defendant contends that Lai only protects unsophisticated, uniformed, and mislead employees from compulsory arbitration of Title VII claims. However, plaintiff's argument presumes that a sophisticated and informed employee may still "unknowingly" agree to arbitration. The Court is persuaded by the defendant's interpretation and finds that the Lai decision was not intended to protect sophisticated and well-informed plaintiffs.

Defendant asserts that the Lai court's decision was based on the fact that the plaintiffs were unsophisticated individuals who were denied the opportunity to ascertain the meaning of documents that they were directed to sign. The Ninth Circuit observed,

> Plaintiffs allege that when they signed the U-4 form, they were told that they were applying to take a test which was required for their employment by Prudential, and that they were simply directed to sign in the relevant place without being given an opportunity to read the forms. Arbitration was never mentioned.

Id. at 1301. Prudential never provided the plaintiffs with a copy of the NASD Manual which contained the allegedly binding arbitration agreement. Id. The Ninth Circuit also held that, even if Prudential had provided the plaintiffs with copies of the NASD arbitration clause, "it

would not have put them on notice that they were bound to arbitrate Title VII claims" because the relevant provision "did not even refer to employment disputes." Id. at 1305.

Defendant argues that plaintiff simply cannot claim "unknowing" agreement to arbitrate because she is a sophisticated individual who was aware or should have been aware that, by signing the Form U-4, she was agreeing to arbitrate any employment dispute. Defendant maintains that, in contrast to the unsophisticated and mislead Lai plaintiffs, Duffield was a highly recruited and sophisticated industry insider who was represented by an attorney. Defendant maintains that, when plaintiff signed a Form U-4 in 1988 as a condition of her employment with defendant, she was familiar with the Form U-4 and its significance by virtue of her six years in the securities industry and having signed Form U-4s on at least two previous occasions. Further, plaintiff had ample opportunity to read the NYSE rules and should have familiarized herself with them. In addition, while the NASD provision at issue in Lai did not refer to arbitration of employment disputes, NYSE Rule 347 explicitly provides for arbitration of employment disputes. See NYSE Rule 347.

While defendant essentially argues that the facts in Lai limit the holding to unsophisticated and uninformed claimants, plaintiff assumes that a sophisticated and well-informed individual can still "unknowingly" agree to arbitrate within the meaning of Lai.

Plaintiff argues that she did not "knowingly" contract to forego her statutory remedies under Title VII for two reasons. First, plaintiff claims that she could not have knowingly agreed to arbitration because she could not have known that the Form U-4 would be interpreted to

mandate arbitration of Title VII claims. Specifically, plaintiff asserts that, at the time she signed the Form U-4 in 1988, the NYSE rules required arbitration of some disputes but not Title VII claims and courts were not interpreting the NYSE rules to require arbitration of Title VII claims. In addition, plaintiff asserts that she could not have agreed to waive her Title VII rights to a jury trial, compensatory damages, or punitive damages because those rights were not established by Congress until the 1991.[2]

Second, plaintiff argues that her agreement to arbitrate was not knowing because she believed that the defendant had agreed not to require arbitration. Plaintiff contends that, during contract negotiations, defendant's behavior caused plaintiff to reasonably believe that defendant had agreed not to require arbitration. However, the Court finds that plaintiff could not have reasonably believed that defendant had waived the arbitration agreement. While the plaintiff, through her attorney, did propose elimination of the mandatory arbitration provision from her contract, no final agreement was reached or reduced to writing.

Plaintiff cites no authority which stands for the proposition that these circumstances constitute "unknowing agreement" within the meaning of Lai. Further, plaintiff does

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[2] Plaintiff advances these arguments in a single paragraph without sufficient discussion or citations to case law. In a reply brief, defendant extensively refutes each of plaintiff's arguments.

The Court will not engage in a discussion of these individual arguments because, even if they are accepted as true, they do not provide a basis for claiming that an arbitration agreement was not knowing within the meaning of the Lai decision. See discussion infra.

not address the factual distinctions between her case and the Lai case.

The Court finds that the Lai decision was not intended to protect a sophisticated and well-informed plaintiff like Duffield. The Court declines to expand the Lai decision to protect sophisticated plaintiffs who know that they are signing arbitration agreements which could be interpreted to require arbitration of all employment disputes. The Court also declines to find that a plaintiff did not knowingly agree to arbitration when the plaintiff, represented by an attorney, has failed to protect her interests by obtaining a binding written contract.

2. Contact of Adhesion

In addition to arguing that plaintiff did not knowingly agree to arbitrate Title VII claims, plaintiff argues that an arbitration provision which is created by an employee signing a Form U-4 as a condition of employment constitutes an unconscionable and therefore unenforceable contract of adhesion.[3]

If an unconscionable arbitration provision appears in a contract of adhesion, such a provision is unenforceable just like any other unconscionable contract term. The Federal Arbitration Act provides that agreements to arbitrate are enforceable, "save upon grounds as exist at law or in equity for revocation of any contract." 9. U.S.C. § 2. Further, the United States Supreme Court holds that, "courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would

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[3] This is also the position of the Equal Employment Opportunity Commission ("EEOC"). (See, EEOC's Amicus Brief at 4.)

provide grounds for the revocation of any contract." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 33 (1991).

Plaintiff asserts that her detailed factual record in this case demonstrates that the securities industry's arbitration procedures do not adequately protect Title VII rights. Therefore, the arbitration provision at issue in this case is an unconscionable provision. Further, plaintiff asserts that since prospective employees, who have little bargaining power, often must sign Form U-4s as a condition of employment, the arbitration agreement at issue is part of a contract of adhesion. Plaintiff concludes that plaintiff's agreement to arbitrate her Title VII claims must be unenforceable because unconscionable arbitration clauses in contract of adhesion are unenforceable.

Plaintiff's argument depends upon the premise that the NYSE arbitration procedures do not adequately protect Title VII rights. The Court's August 26, 1996 Order clearly held that, "the NYSE arbitration scheme does adequately protect plaintiff's Title VII rights." (Order Vacating and Modifying Order of August 6, 1996 at 14). For the reasons stated in the August Order, the Court declines to alter its holding on this issue. Therefore, the Court concludes that the arbitration provision at issue is not unconscionable.

In addition, plaintiff cannot reasonably contend that she was forced to agree to arbitration in the face of "overwhelming economic power". Gilmer, 500 U.S. at 33. In Gilmer, the Supreme Court concluded that "[t]here is no indication in this case, however, that Gilmer, an experienced businessman, was coerced or defrauded into agreeing to the arbitration clause in his registration application." Id. Like Gilmer, Duffield was a sophisticated and highly recruited individual who was represented

by an attorney. As plaintiff's own evidence and arguments demonstrate, plaintiff had substantial bargaining power and did negotiate for an employment contract that would not mandate arbitration of employment disputes. She simply failed to ensure that such a contract was reduced to writing. The Court cannot conclude on the facts of this case that the plaintiff was compelled to enter into a contract of adhesion.

B. Plaintiff's Request for Reconsideration

In response to the Court's February 7, 1997 oral ruling compelling arbitration of plaintiff's substantive claims, plaintiff filed a citation of new authority and request for reconsideration. Plaintiff seeks leave to file a motion to reconsider based on the recent D.C. Circuit case Cole v. Burns International Security Services, ___ F.3d ___, 1997 U.S. App. LEXIS 2223 (D.C. Cir. 1997).

In Cole, the plaintiff, a security guard at Union Station in Washington D.C., signed an agreement to arbitrate employment disputes according to the rules of the American Arbitration Association ("AAA"). The D.C. Circuit states that,

> We note that this case raises an issue not directly presented in Gilmer or any other Supreme Court case to date: can an employer require an employee to arbitrate all disputes and also require the employee to pay all or part of the arbitrator's fees? We hold that it cannot.

Id. at *5. On the basis of this holding, the Court compelled arbitration of the dispute, but found that the arbitration agreement had to be construed to require the employer to pay all arbitration fees in order for the agreement to be enforceable. Id.

Plaintiff contends that the substantial factual record which plaintiff has developed for purposes of this litigation demonstrates that, under the NYSE arbitration procedures, Title VII claimants are often charged large forum fees. As a result, plaintiff contends that applying the analysis of the Cole decision to the NYSE arbitration procedures necessarily leads to the conclusion that arbitration agreements based on Form U-4s are unenforceable.

Defendant responds that Cole states that the NYSE and NASD rules do not raise the same concerns as the AAA procedures. The D.C. Circuit explained that,

> This was not an issue in Gilmer (and other like cases), because, under NYSE Rules and NASD Rules, it is standard practice in the securities industry for employers to pay all of the arbitrators' fees. Employees may be required to pay a filing fee, expenses, or an administrative fee, but these expenses are routinely waived in the event of hardship.

Id. at *59.

Although Cole may provide support for plaintiff's claim that Title VII claimants should not be charged fees in order to gain access to a neutral forum, the Court finds that Cole does not provide any basis for denying the defendant's motion to compel arbitration. The Cole Court stated,

> We acknowledge the concerns that have been raised regarding arbitration's ability to vindicate employees' statutory rights. However, for all of arbitration's shortcomings, the process, if fairly conducted, is not necessarily inferior to litigation

> as a mechanism for the resolution of employment disputes.

Id. at *73. Cole does not mandate invalidating arbitration provisions because they require arbitration of Title VII claims. Even assuming arguendo that the NYSE arbitration process imposes impermissible fees on the Title VII claimants, Cole only provides persuasive authority for denying such fees. Therefore, even if Cole were binding authority in the Ninth Circuit, the Court would only invalidate any "arbitrator's fees" charged to the plaintiff rather than declare the arbitration agreement unenforceable. The Court cannot and will not expand the holding in Cole to invalidate the NYSE arbitration procedures.

Therefore, the Court DENIES plaintiff's request for reconsideration based on Cole.

C. Request for Judgment Pursuant to Rule 54(b)

Plaintiff asks that the Court enter judgment pursuant to Fed. R. Civ. P. 54(b) on plaintiff's first claim for declaratory relief and stay any arbitration proceedings until the Ninth Circuit considers plaintiff's appeal. Rule 54(b) provides that a Court may enter final judgment on one claim in an action "only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." Fed. R. Civ. P. 54(b).

Plaintiff argues that an Order compelling arbitration amounts to a de facto denial of her claim for declaratory relief. Therefore, the Court should not delay plaintiff's appeal of this issue to the Ninth Circuit. However, the Ninth Circuit has held that,

> if the motion to compel arbitration in a given case is the only claim before the district court, a deci-

> sion to compel arbitration is deemed to dispose of the entire case, and permit appellate review under 9 U.S.C. § 16(a)(3) . . . On the other hand, if the motion to compel arbitration is 'embedded' in a substantive suit pending before that court, the district court's decision to compel arbitration of some or all of the claims before it is not considered to be final, and therefore not reviewable.

Lai, 42 F.3d at 1302. (citations omitted); see also, Adair Bus Sales, Inc. v. Blue Bird Corp., 25 F.3d 953, 955 (10th Cir. 1994) ("an order does not constitute a final decision, and is not immediately reviewable on appeal, if issues other than the propriety of arbitration are raised or relief other than a determination as to the arbitration of the dispute is sought"). An embedded motion to compel exists when "the underlying merits of the claims for relief are not resolved until arbitration is completed." Perera v. Siegel Trading Co., Inc., 951 F.2d 780, 784 (7th Cir. 1992).

In the instant case, the defendant's motion to compel arbitration is clearly embedded in the substantive suit because the merits of the case will not be resolved until arbitration is complete. Therefore, the Court's decision to compel arbitration cannot constitute an appealable final judgment. The decision more closely resembles an interlocutory decision setting a case for trial because it does not resolve or terminate all the proceedings before this Court. Id. at 786.

By requesting a final judgment on her first cause of action, plaintiff essentially asks the Court to transform an unappealable interlocutory decision into an appealable final judgment. However, the Seventh Circuit holds that, "a district court's entry of a Rule 54(b) judgment cannot transform an interlocutory decision into a final decision." Id. If such a transformation were allowed, the district

court could expand the jurisdiction of the circuit court. Id. Therefore, the Court will not enter judgment on plaintiff's declaratory relief claim pursuant to Rule 54(b).

D. Certification

Although the Court declines to enter judgment pursuant to Rule 54(b), the Court has decided to certify this Order and the Court's August 26, 1996 Order for immediate appeal pursuant to 28 U.S.C. § 1292(b). In the August Order, the Court found that certification was inappropriate. After considering the briefs of the parties and especially the oral arguments of plaintiff's counsel at the February hearing, the Court now finds that:

(1) These Orders involve a controlling question of law as to which there is substantial ground for difference of opinion;[4]

(2) that an immediate appeal from these Orders may materially advance the ultimate termination of the litigation.[5]

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[4] The Court recognizes that Gilmer and Lai provide clear guidance on the issues raised by the plaintiff. Nevertheless, the plaintiff's arguments, the EEOC's opposition to the NYSE arbitration proceedings, and the Cole decision persuade the Court that a substantial ground for difference of opinion exists in this case.

[5] Plaintiff has represented that the primary purpose of this litigation is to challenge the NYSE's arbitration procedures. Therefore, regardless of the result of the arbitration proceedings, plaintiff will appeal her case to the Ninth Circuit. The Court believes that it will materially advance the ultimate termination of this litigation to have a ruling from the Ninth Circuit sooner rather than later.

This Order and the August 26, 1996 Order in this matter is therefore CERTIFIED for immediate appeal pursuant to 28 U.S.C. § 1292(b).

IV. CONCLUSION

For the foregoing reasons and for good cause shown, the Court hereby ORDERS that:

(1) Defendants motion to compel arbitration is GRANTED.

(2) Plaintiff's request for reconsideration is DENIED.

(3) Plaintiff's request for entry of judgment pursuant to Rule 54(b) is DENIED.

(4) This Order and the Court's August 26, 1996 Order are CERTIFIED for appeal pursuant to 28 U.S.C. § 1292(b).

(5) Arbitration of this case is STAYED pending action by the Ninth Circuit. If the Ninth Circuit decides not to review the Court's Orders, arbitration shall proceed immediately.

IT IS SO ORDERED

DATED: MAR 13, 1997.

/s/
EUGENE F. LYNCH
United States District Judge

APPENDIX D

[Stamped:
FILED
APR 21 1997
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TONJYA DUFFIELD,	No. 97-80126
Petitioner,	DC# CV-95-109-EFL Northern California
vs.	
ROBERTSON, STEPHENS & COMPANY, a partnership, et al.,	ORDER
Respondents.	

Before: BROWNING and THOMPSON, Circuit Judges

The petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) is granted. Within 10 days of the date of this order, petitioner shall perfect the appeal pursuant to Fed. R. App. P. 5(d).

APPENDIX E

Relevant Statutory Provisions

Civil Rights Act of 1991,

Section 118 of Title I of Pub. L. 102-166, *as reprinted in* 42 U.S.C. § 1981 note:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title (enacting section 1981a of this title and amending this section, sections 1988, 2000e, 2000e-1, 2000e-2, 2000e-4, 2000e-5, 2000e-16, 12111, and 12112 of this title, and section 626 of Title 29, Labor).

Federal Arbitration Act

9 U.S.C. § 2.
Validity, irrevocability, and enforcement of agreements to arbitrate

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds

as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 3.
Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

(2)

Supreme Court, U.S.
FILED
OCT 5 1998
OFFICE OF THE CLERK

No. 98-237

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

ROBERTSON, STEPHENS & COMPANY,
Petitioner,

v.

TONYJA DUFFIELD,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION

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29 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	3
1. Ms. Duffield's Complaint	3
2. The District Court's Rulings	6
3. The Ninth Circuit's Decision	6
REASONS FOR DENYING THE WRIT	8
I. THIS IS NOT AN APPROPRIATE CASE FOR ANSWERING THE QUESTION PRESENTED BECAUSE THE NEW YORK STOCK EXCHANGE HAS ABANDONED THE REQUIREMENT OF MANDATORY ARBITRATION OF STATUTORY EMPLOYMENT DISCRIMINATION CLAIMS	8
II. THIS CASE IS ALSO NOT THE RIGHT VEHICLE FOR ANSWERING THE QUESTION PRESENTED BECAUSE IT ARISES IN THE CONTEXT OF A UNIQUE MANDATORY ARBITRATION SYSTEM THAT HAS BEEN RECOGNIZED AS INADEQUATE TO VINDICATE STATUTORY DISCRIMINATION CLAIMS AND THAT IS INVOLUNTARILY IMPOSED ON AN INDUSTRY-WIDE BASIS	10
III. THE CONFLICT AS TO THE QUESTION PRESENTED MAY WELL RESOLVE ITSELF AND, EVEN IF IT DOES NOT, THIS COURT WOULD BENEFIT FROM THE VIEWS OF OTHER CIRCUITS	20
CONCLUSION	22

TABLE OF AUTHORITIES

CASES — Page

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 11
Bercovitch v. Baldwin Schools, Inc., 133 F.3d 141 (1st Cir. 1998) 18
Cole v. Burns International Security Servs., 105 F.3d 1465 (D.C. Cir. 1997) 11, 14
Desiderio v. NASD, Inc., 2d Cir. No. 98-6100 21
Farrand v. Lutheran Broth., 993 F.2d 1253 (7th Cir. 1993) 6
Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) ..... *passim*
Green v. McElroy, 360 U.S. 474 (1959) 17
Koveleskie v. SBC Capital Markets, Inc., 7th Cir. No. 98-1793 21
Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995) 18
Prudential Insurance Co. v. Lai, 42 F.3d 1299 (9th Cir. 1994), *cert. denied*, 116 S. Ct. 61 (1995) 5, 6
Pryner v. Tractor Supply Co., 109 F.3d 354 (7th Cir.), *cert. denied*, 118 S. Ct. 294 (1997) 18
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Renteria v. Prudential Insurance Co., 113 F.3d 1104 (9th Cir. 1997) 5, 6
Rosenberg v. Merrill Lynch, 995 F. Supp. 190 (D. Mass. 1998), *appeal pending* No. 98-1426 (1st Cir.) 12, 21
Seus v. John Nuveen & Co., 146 F.3d 175 (3d Cir. 1998) 20, 21
Wright v. Universal Maritime Service Corp., No. 97-889, *cert. granted*, 118 S. Ct. 1162 (1998) 21, 22

STATUTES

28 U.S.C. § 1292(b) 6
42 U.S.C. § 2000e-5(k) 13
Civil Rights Act of 1991, Pub. L. 102-166, § 118 .... *passim*

TABLE OF AUTHORITIES—Continued

LEGISLATIVE HISTORY

Page

137 Cong. Rec. H9548 (daily ed. Nov. 7, 1991) 18
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SECURITIES EXCHANGE RULES

NASD Code of Arbitration Rule 10304 9
NYSE Rule 347 ..... *passim*

MISCELLANEOUS

Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship, 50 Disp. Resol. J. 37 (Oct.-Dec. 1995) 15
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TABLE OF AUTHORITIES—Continued

	Page
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National Academy of Arbitrators' Statement and Guidelines, 103 Daily Labor Rep. (BNA) E-1 (May 29, 1997)	15
SEC Approves NASD Proposal to End Mandatory Arbitration of Bias Claims, 121 Daily Labor Report (BNA) A-10 (June 24, 1998)	8

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BRIEF IN OPPOSITION

Largely overlooked in Robertson Stephens' Petition for Writ of Certiorari is that this case arises in the unique factual context of the securities industry arbitration system—specifically, the compulsory employment arbitration procedures of the New York Stock Exchange ("NYSE"). However, four weeks after Robertson Stephens filed its Petition for Certiorari, the NYSE's Board of Directors voted to amend the NYSE's arbitration rules to *abandon* the compulsory arbitration requirement for statutory employment discrimination cases. Once that rule change is approved by the Securities Exchange Commission ("SEC"),

the only statutory employment discrimination claims that NYSE arbitration panels will be permitted to accept for hearing are those that the parties voluntarily agree to arbitrate *after* the claims arise. Employment discrimination claims like those of Ms. Duffield, which are *not* the subject of a post-dispute arbitration agreement, will *not* be arbitrable before the NYSE. Because the SEC is expected to approve the NYSE's proposed rule change in the near future, this case is almost certain to become moot as to the central arbitrability issue long before this Court could issue a decision on the merits.

Robertson Stephens' failure to address the securities industry context of this case also masks a second reason why this Court is unlikely to reach the broadly-stated Question Presented. Among Ms. Duffield's challenges to the enforceability of the Form U-4 arbitration clause was her fact-based contention, fully supported by extensive record evidence developed over several years of discovery, that securities industry arbitration in actual practice is *not* adequate to protect the statutory rights of employment discrimination plaintiffs. Although the Ninth Circuit panel did not reach that argument, plaintiff's challenge to the substantive adequacy of the securities industry arbitration system provides a narrower, fact-based ground for affirmance that logically should be considered by this Court before the more broadly-stated issue addressed by the Petition.

It also bears emphasis at the outset that nothing in the panel's decision precludes or even criticizes *voluntary* pre-dispute agreements to arbitrate statutory employment discrimination claims. Ms. Duffield fully agrees that arbitration may be an appropriate method of resolving employment disputes, and that Congress in the 1991 Civil Rights Act amendments encouraged the use of arbitration (among other consensual forms of alternative dispute resolution) *when the agreement to arbitrate is voluntary and the resulting arbitration scheme is adequate to protect*

statutory rights. The dispute *here* is not about consensual arbitration in a system that is fair to both parties, but about whether an entire industry can unilaterally strip its workers of their right to litigate statutory discrimination claims by imposing binding arbitration as a non-negotiable condition of employment, thus relegating those workers to a dispute resolution system that, in actual practice, does not provide essential substantive and procedural protections. The reason the National Academy of Arbitrators and EEOC filed *amici curiae* briefs in support of Ms. Duffield in the Ninth Circuit is not because they oppose arbitration, but because the securities industry's mandatory arbitration system is unilaterally imposed on employees and fails to provide victims of discrimination with the basic protections essential to an effective, and legally enforceable, system of arbitration.

STATEMENT OF THE CASE

1. *Ms. Duffield's Complaint*

a. Like every individual who worked as a securities trader in the United States securities industry during the period of her employment, respondent Tonyja Duffield was required—by federal law and the rules of the national securities exchanges—to submit all employment disputes to binding securities industry arbitration. Before she could begin working in the industry, Ms. Duffield was required to execute the securities industry's Form U-4 and thereby to register and be bound by the rules of every national securities exchange of which her employer was a member—in Ms. Duffield's case, the NYSE and the National Association of Securities Dealers ("NASD"). Pet. App. 9a-10a. At the time Ms. Duffield filed suit, the arbitration rules of both the NYSE and the NASD required registered representatives to arbitrate all employment disputes, at their employers' option, under the exchanges' arbitration rules and procedures. Pet. App. 10a-11a. Ms. Duffield therefore had no choice about whether

to sign the Form U-4 or its clause requiring her to submit future employment disputes to binding securities industry arbitration. Had she refused to sign, she could not lawfully have been employed as a trader for *any* U.S. securities industry employer. Pet. App. 9.

b. On January 11, 1995, Ms. Duffield filed a district court complaint alleging that her former employer Robertson Stephens had subjected her to sexual discrimination, sexual harassment and retaliation in violation of Title VII of the 1964 Civil Rights Act and California's Fair Employment and Housing Act ("FEHA"). Ms. Duffield also alleged that Robertson Stephens had engaged in common law breaches of contract, fraud, deceit, and intentional and negligent infliction of emotional distress. Pet. App. 12a, 59a. As a threshold matter, however, Ms. Duffield's first claim for relief sought a declaratory judgment that the securities industry's pre-dispute mandatory arbitration scheme was unlawful, because it deprived her of statutory and constitutional rights to litigate her employment claims in federal court before a jury of her peers. Pet. App. 12a.

In support of her claim for declaratory relief, Ms. Duffield presented five interrelated reasons why she could not be compelled to arbitrate her statutory employment discrimination claims:

First, Title VII precludes enforcement of the NYSE's compulsory pre-dispute arbitration requirements because the exchange's arbitration system, in actual practice, is not adequate to protect substantive Title VII rights. Rather, it often deprives plaintiffs of their rights to statutory fee-shifting, punitive damages and other substantive rights, is unduly expensive (with thousands of dollars in "forum fees" regularly imposed), and impermissibly subjects federally-protected antidiscrimination rights to the unfettered discretion of inadequately-trained, non-neutral arbitrators who are explicitly told that they are required neither to follow the law nor to explain the reasoning underlying their decisions.

Second, Ms. Duffield did not knowingly agree to arbitrate her statutory employment discrimination claims, as Title VII requires before any such agreement can be enforced, because the arbitration clause in the Form U-4 that Ms. Duffield was required to sign as a condition of her employment did not provide adequate notice that her right to litigate those claims was being waived;[1]

Third, Ms. Duffield did not voluntarily execute the Form U-4's compulsory pre-dispute arbitration clause, as Title VII also requires, because she was compelled to execute the Form U-4 and submit to mandatory arbitration as a non-negotiable condition of pursuing her chosen profession as a securities trader in the United States securities industry;

Fourth, the Form U-4 arbitration clause constituted an unconscionable contract of adhesion, because it required securities industry employees like Ms. Duffield to arbitrate all future Title VII claims in a forum that, in actual practice, was not adequate to vindicate substantive Title VII rights; and

Fifth, mandatory securities industry arbitration imposed an unconstitutional condition of employment on Ms. Duffield, because it deprived her of her rights under Article III and the Fifth and Seventh Amendments. Pet. App. 12a.[2]

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[1] *See Renteria v. Prudential Ins. Co.*, 113 F.3d 1104 (9th Cir. 1997); *Prudential Ins. Co. v. Lai*, 42 F.3d 1299 (9th Cir. 1994), *cert. denied*, 116 S.Ct. 61 (1995). At the time Ms. Duffield signed her Form U-4 in 1988, the overwhelming weight of authority was that compulsory agreements to arbitrate future employment claims were unenforceable as to Title VII claims. Pet. App. 16a-18a.

[2] *See also* Conditional Cross-Petition for Writ of Certiorari in 98-409. As Ms. Duffield explains in her accompanying Cross-Petition, she also contended that her "unconstitutional conditions" argument precluded the district court from compelling arbitration of her state common law claims, in addition to her federal and state statutory claims. *Id.* at 9 & n.5; *see also* Pet. App. 12a.

2. *The District Court's Rulings*

Following extensive discovery in the district court, Ms. Duffield moved for summary judgment on her declaratory judgment claim that she could not be compelled to submit her Title VII and other claims to binding securities industry arbitration under the NYSE's rules and procedures (which were the *only* rules and procedures that Robertson Stephens sought to defend). Pet. App. 60a-81a.[3] The district court denied Ms. Duffield's motion and subsequently granted Robertson Stephens' motion to compel NYSE arbitration. Pet. App. 57a, 72a. However, recognizing "that a substantial ground for difference of opinion exists," the district court certified its orders for interlocutory appeal under 28 U.S.C. § 1292(b) and stayed its order compelling arbitration pending an appellate decision. Pet. App. 86a-87a.

3. *The Ninth Circuit's Decision*

The Ninth Circuit granted interlocutory review under 28 U.S.C. § 1292(b). Pet. App. 88a. After briefing and argument, the panel reversed the district court in part, affirmed in part, and remanded for further proceedings. Pet. App. 56a.

Addressing Ms. Duffield's challenge to the involuntariness of securities industry arbitration first, the court of appeals examined the historical and statutory evolution of employment discrimination arbitration and Congress' intent in amending Title VII in the Civil Rights Act of 1991. *See* Pet. App. 15a-45a. The court agreed with Ms. Duffield (and the EEOC, among others, as *amicus*

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[3] By the time Ms. Duffield's case was litigated below, several cases had already held that the NASD's arbitration rules were not enforceable against plaintiffs pursuing Title VII claims because those rules, at least prior to 1993, did not make clear that any statutory discrimination claims were encompassed. *See Farrand v. Lutheran Broth.*, 993 F.2d 1253 (7th Cir. 1993); *Prudential Insurance Co. v. Lai*, 42 F.3d at 1305; *Renteria v. Prudential Ins. Co.*, 113 F.3d at 1107.

curiae) that Congress intended to preclude enforcement of involuntary, pre-dispute arbitration agreements encompassing future Title VII and state statutory employment discrimination claims. Pet. App. 46a-47a.

The undisputed facts demonstrated that Ms. Duffield was required to sign the Form U-4 and to submit to its mandatory arbitration requirement as a non-negotiable condition of working as a securities trader for *any* employer in the industry. Pet. App. 13a-14a. The panel therefore reversed the district court insofar as it had compelled Ms. Duffield to arbitrate her federal and state statutory discrimination claims. Pet. App. 56a. The court emphasized, however, that nothing in its decision precluded the enforcement of *voluntary* pre- or post-dispute agreements to arbitrate employment discrimination claims. Pet. App. 46a-47a.

Having ruled that plaintiff could proceed in federal court on her statutory discrimination claims because she had not voluntarily agreed to arbitrate them, the Ninth Circuit found it unnecessary to consider all but one of Ms. Duffield's remaining challenges (including her challenge to the adequacy of the securities industry arbitration forum), which presented alternative grounds supporting the same result. Pet. App. 22a n.7; *see supra* at 4-5. However, the panel did address Ms. Duffield's unconstitutional conditions argument, which also challenged the compelled arbitration of her state *common law* contract and tort claims. Pet. App. 48a-55a.[4]

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[4] The Ninth Circuit's rejection of that argument is the subject of Ms. Duffield's Conditional Cross-Petition for Certiorari in No. 98-409.

REASONS FOR DENYING THE WRIT

I. THIS IS NOT AN APPROPRIATE CASE FOR ANSWERING THE QUESTION PRESENTED BECAUSE THE NEW YORK STOCK EXCHANGE HAS ABANDONED THE REQUIREMENT OF MANDATORY ARBITRATION OF STATUTORY EMPLOYMENT DISCRIMINATION CLAIMS.

As Robertson Stephens noted in its Petition, several weeks after the panel's decision in this case, the SEC approved a major change in the NASD's arbitration rules, eliminating the requirement that registered representatives must arbitrate statutory employment discrimination claims before the NASD. Pet. 29 n.14; *see* SEC Order Granting Approval to Proposed Rule Change Relating to the Arbitration of Employment Discrimination Claims, SR-NASD-97-77, SEC Release No. 34-40109 (June 22, 1998). The NASD rule change goes into effect January 1, 1999. *Id.*

After the SEC approved the NASD's rule change, the SEC Chairman issued a statement encouraging all remaining national securities exchanges "to promptly change their rules to conform to those of the NASD." *SEC Approves NASD Proposal to End Mandatory Arbitration of Bias Claims,* 121 Daily Labor Report (BNA) A-10 (June 24, 1998). On September 3, 1998, the NYSE's Board of Directors accepted that invitation, voting to amend NYSE Rule 347 (quoted in the Petition for Certiorari at 4) by adding the following provision:

> A claim alleging employment discrimination, including any sexual harassment claim, in violation of a statute shall be eligible for arbitration *only where the parties have agreed to arbitrate the claim after it has arisen.* [*New York Stock Exchange Moves to End Mandatory Arbitration of Bias Claims,* 173 Daily Labor Report (BNA) A-2 (September 8, 1998) (emphasis added).]

The proposed amendment, which would *preclude* arbitration of Ms. Duffield's statutory employment discrimination claims, is now awaiting formal SEC approval. *Id.*[5]

The SEC is likely to approve the amendment to NYSE Rule 347 in the near future. The probability is therefore very high that, if this Court granted certiorari, the case would become moot as to the Question Presented long before this Court decided that question. Granting certiorari in this case would therefore pose the risk of wasting the Court's resources and those of the parties and their supporting *amici curiae*. A grant of certiorari might also have the detrimental effect of leading some lower courts to stay litigation while awaiting the outcome of a case that ultimately would not be decided by this Court.

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[5] The complete text of the proposed NYSE rule is set forth in the Appendix to this Brief in Opposition. As noted above, Robertson Stephens sought to compel arbitration *only* under the NYSE rules. Although Ms. Duffield's Form U-4 also required her to be bound by the NASD's arbitration rules, Robertson Stephens neither sought to compel arbitration under the NASD's rules (now amended), nor sought to defend the legal adequacy of the NASD's arbitration system. Pet. App. 60a, 69a-70a; *see supra* at 6. And, as stated, controlling Ninth Circuit precedent would have precluded NASD arbitration of statutory discrimination claims in any event. *See supra* at 6 n.3.

Even if Robertson Stephens had preserved the issue below, however, the recent amendment to the NASD's rules would moot Robertson Stephens' efforts to compel NASD arbitration. Under the NASD's new rule, registered representatives are not required to arbitrate before NASD panels any statutory discrimination claim filed in the NASD system after January 1, 1999. Ms. Duffield has not filed such a claim, and even if certiorari were granted and the Ninth Circuit were reversed, this Court would not be likely to issue its decision in this case by that date. Consequently, Robertson Stephens could not compel arbitration into the NASD system either. *See also* NASD Code of Arbitration Rule 10304 (authorizing NASD arbitrators "at any time during the course of an arbitration" to dismiss the arbitration and "refer the parties to their judicial remedies").

II. THIS CASE IS ALSO NOT THE RIGHT VEHICLE FOR ANSWERING THE QUESTION PRESENTED BECAUSE IT ARISES IN THE CONTEXT OF A UNIQUE MANDATORY ARBITRATION SYSTEM THAT HAS BEEN RECOGNIZED AS INADEQUATE TO VINDICATE STATUTORY DISCRIMINATION CLAIMS AND THAT IS INVOLUNTARILY IMPOSED ON AN INDUSTRY-WIDE BASIS.

Robertson Stephens' Petition for Certiorari wrongly assumes only two possible answers to the question whether Title VII, as amended by the Civil Rights Act of 1991, precludes employees from being forced, as a condition of employment, to sign "agreements" to arbitrate future statutory discrimination claims rather than to litigate those claims in court. The possible answers to that question are not limited to "yes" and "no"—which is a further reason why this securities industry case would not be the right vehicle for considering the Question Presented on certiorari even if the question were not likely to become moot.

A. Another possible answer to the Question Presented is that Title VII prohibits the enforcement of pre-dispute mandatory employment discrimination arbitration agreements *that relegate plaintiffs to an arbitral forum that is inadequate to vindicate their statutory rights.* The Ninth Circuit held, correctly we believe, that *no* involuntary pre-dispute arbitration agreement would be "appropriate and . . . authorized by law" within the meaning of § 118 of the Civil Rights Act of 1991, Pub. L. 102-166. At a minimum, however, this Court's precedents establish that unless a mandatory arbitration scheme is adequate to protect Title VII rights, it is neither appropriate nor authorized by law. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991), *quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985) (binding arbitration of statutory rights may only be compelled "so long as the prospective litigant effectively may vindicate [his or her] statutory

cause of action in the arbitral forum"); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51, 56-58 (1974) ("there can be no prospective waiver of an employee's rights under Title VII" where the purported waiver requires the employee to adjudicate his statutory claims before a tribunal of labor arbitrators who are required to apply the "law of the shop," but not the law of the statute).

Robertson Stephens' Petition for Certiorari wrongly assumes that securities industry arbitration adequately protects statutory rights, asserting that the adequacy of NYSE arbitration was definitively resolved in *Gilmer*. Pet. at 14-15. But Robertson Stephens mischaracterizes the scope, analysis and holding of *Gilmer*. The Court in *Gilmer* rejected only a *facial* challenge to the adequacy of the NYSE arbitration scheme, and specifically stated that it was not pretermitting future, fact-based challenges to the adequacy of the securities industry mandatory arbitration scheme. Indeed, the Court invited such challenges "for resolution in specific cases." 500 U.S. at 33; *see Cole v. Burns Int'l Security Servs.*, 105 F.3d at 1482 ("Obviously, *Gilmer* cannot be read as holding that an arbitration agreement is enforceable no matter what rights it waives or burdens it imposes").

There was no evidence in *Gilmer* demonstrating how the securities industry arbitration system functioned in actual practice—nor could there have been, since *Gilmer* pre-dated virtually every securities industry employment discrimination arbitration award. This case, however, *does* provide such a detailed evidentiary record, based on almost two years of discovery into the actual *post-Gilmer* workings of securities industry employment arbitration. Ms. Duffield's challenges to the adequacy of the arbitral forum thus rested on a comprehensive evidentiary record that included: *every* 1990-95 employment discrimination decision issued by NYSE arbitration panels and most of the NASD employment discrimination decisions; virtually *all* the documentary materials used by the NYSE and

NASD in training securities industry arbitrators; lengthy depositions of the individuals in charge of the NYSE and NASD arbitration programs; and dozens of government documents concerning the development, scope, and impact of the securities industry's arbitration rules. The resulting record, which would provide an alternative ground for affirming the Ninth Circuit's judgment, establishes, *inter alia*, that:

• Securities industry arbitrators are expressly instructed in *The Arbitrators Manual* (the only training guide distributed by the NYSE and NASD to *all* of their arbitrators) that arbitrators are *not* required to follow "case precedent or statutory law" in deciding employment discrimination cases, but may substitute their own sense of "fairness" for the statutory standards that Congress enacted and the federal courts have interpreted. Appellant's Ninth Circuit Excerpts of Record ("ER"), Ex. D at 8.[6] This instruction creates an unacceptably high risk that what a securities industry arbitrator concludes is "fair" in deciding a Title VII claim will not be what a federal judge, or properly-instructed jury, would conclude is the proper result based on the extensive case law interpreting and applying the complex doctrines underlying Title VII —particularly because the arbitrators selected by the exchanges are mostly former securities industry executives who have no legal experience or training and who volunteer to serve as arbitrators for small honoraria from the exchanges. GAO Report HEHS-94-17, *Employment Discrimination: How Registered Representatives Fare in Discrimination Disputes* (March 30, 1994) at 8, 12-13; *see also Rosenberg v. Merrill Lynch*, 995 F.Supp. 190, 206-212 (D. Mass. 1998), *appeal pndg.* No. 98-1426 (1st Cir.) (analyzing the inherent structural biases in NYSE arbitration).

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[6] Like virtually all the evidence Ms. Duffield presented to the district court, *The Arbitrators Manual* was not before this Court in *Gilmer*.

• The NYSE and NASD staff, and their arbitration training manuals, explicitly discourage securities industry arbitrators from including findings of fact, conclusions of law, or other written analyses in their awards—for the express purpose of *precluding* meaningful judicial review of those awards.[7] As demonstrated by the employment discrimination arbitration awards set forth in the record, securities industry arbitration awards (which are generally written by the exchange's staff, not the arbitrators, ER, Ex. D at 13-14 & nn. 26-27) are rarely longer than three sentences, almost never include any statement of reasons, and in multi-claim cases often do not explain the ground (if any) on which plaintiff prevailed. ER, Ex. G (Buck Depo. Ex. 32).

• To the extent information can be gleaned from these arbitration awards, it is that securities industry arbitrators, in actual practice, frequently do *not* follow Title VII. For example, Congress in Title VII sought to encourage victims of discrimination to vindicate their statutory rights, in part by shifting a prevailing plaintiff's reasonable attorneys' fees and costs to the losing defendant. *See* 42 U.S.C. § 2000e-5(k). The record shows, however, that securities industry arbitrators are *not* instructed that fee-shifting to prevailing plaintiffs is mandatory, and moreover, that securities industry arbitrators routinely fail to award mandatory statutory fees to prevailing Title VII plaintiffs. ER, Ex. D at 9 & n.20, Ex. G (Buck Depo. Ex. 32).

• Securities industry arbitration procedures also chill plaintiffs from pursuing statutory claims in the first place,

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[7] *See, e.g., The Arbitrators, Manual,* ER, Ex. F (Mascucci Depo. Ex. I at 30) ("Once a decision is made, the staff member reduces the award to writing. Under present law, an arbitrator is not required to give a reason for the decision"); *If We Wanted Your Opinion, We Would Have Asked For It,* ER, Ex. F (Mascucci Depo. Ex. 12 at 2-3) (instructing NASD arbitrators that "awards that do not contain the panel's reasons" will eliminate any "basis for a court to vacate an arbitration award").

because the exchanges' SEC-approved rules allow arbitrators as a matter of course to impose oppressive arbitration "forum fees" on the parties (including prevailing plaintiffs in statutory cases). Such "forum fees," which accumulate at the rate of $3,000 per day of arbitration, have amounted to as much as $82,000 in a single discrimination case. ER, Ex. D at 11-13. In securities industry arbitration, then, individuals complaining of unlawful discrimination are being charged substantial sums for the right to bring Title VII claims, and are routinely being denied the right to recover those costs even if they prevail. By so skewing the economic balance that Congress deemed essential to federal anti-discrimination policy, securities industry arbitration undermines Title VII standards and improperly chills the exercise of protected statutory rights. *See Cole v. Burns Int'l Security Servs.*, 105 F.3d 1465, 1468, 1482-85 (D.C. Cir. 1997) (footnote omitted) ("If there is any risk that an arbitration agreement can be construed to require [an employee to pay the costs of arbitration], this would surely deter the bringing of arbitration and constitute a *de facto* forfeiture of the employee's statutory rights").

• None of the NYSE employment discrimination arbitration decisions between 1990-95 awarded punitive damages or injunctive relief. ER, Ex. F (Buck Depo. Ex. 32). Although it is impossible to know why no such relief was granted (because the awards lack any explanation of their reasoning), many of the arbitrator training materials in the record misstate the standards for awarding punitive damages. ER, Ex. D at 10-11 & n. 21.

• The securities industry's mandatory employment arbitration procedures also do not comply with many of the minimum procedural protections of the Due Process Protocol—a standard that the National Academy of Arbitrators, the American Arbitration Association, JAMS/Endispute, and several blue-ribbon government panels have advocated as setting forth the essential conditions

precedent to the enforcement of any arbitration agreement encompassing statutory discrimination claims.[8]

For these reasons, among others, the record below shows that securities industry arbitration is *not* simply an alternative forum that equally protects statutory rights—which is why several recent empirical surveys have concluded, based on statistical evidence, that "employers stand a greater chance of success in arbitration rather than in court before a jury."[9] These well-documented

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[8] *See, e.g.*, National Academy of Arbitrators' Statement and Guidelines, 103 Daily Labor Rep. (BNA) E-1 (May 29, 1997); National Academy of Arbitrators' *Amicus Curiae* Brief to the Ninth Circuit in Support of Appellant; Commission on the Future of Worker-Management Relations Report and Recommendations, 1994 Daily Labor Rep. (BNA) 105 (June 3, 1994); Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship, 50 Disp. Resol. J. 37 (Oct.-Dec. 1995).

[9] *See, e.g.*, Bompey & Pappas, *Is There A Better Way? Compulsory Arbitration of Employment Discrimination Claims After Gilmer*, 19 Empl. Rel. L.J. 197, 208 (1994); *accord*, Bompey & Stempel, *Four Years Later: A Look At Compulsory Arbitration of Employment Discrimination Cases After Gilmer v. Interstate/Johnson Lane Corp.*, 21 Empl. Rel. L.J. 21, 43 (1995); L. Bingham, *Employment Arbitration: The Repeat-Player Effect*, 1 Empl. Rights and Empl. Policy Journal 1 (1997), *cited in* EEOC Policy at E-8 & n.17; D. Schwartz, *Enforcing Small Print To Protect Big Business: Employee and Consumer Rights Claims In An Age of Compelled Arbitration*, 1997 Wisc. L.R. 33, 64-66 (1977).

Although several industry groups have recently conducted studies aimed at suggesting that claimants fare equally well in securities arbitration, those studies fail to compare the cases that settle (which occurs far more often in court cases), fail to compare the amounts the plaintiffs recover (which are higher in court, and would be particularly high in cases involving well-paid securities brokers), and fail to consider the chilling effect of mandatory arbitration. Moreover, the industry's paternalistic suggestion that securities employers insist on mandatory arbitration because that system provides the greatest benefit to the victims of their discrimination lacks credibility. If Title VII claimants truly fared better in the arbitration system than in the judicial system, securi-

inadequacies of mandatory securities industry arbitration scheme are also one of the reasons the EEOC and the National Academy of Arbitrators have publicly criticized mandatory pre-dispute arbitration agreements extracted as a non-negotiable condition of employment against workers asserting statutory employment discrimination claims.[10]

The question whether securities industry arbitration is an adequate forum for vindicating Title VII rights is logically decided by this Court before Robertson Stephens' more abstract Question Presented, because it provides a narrower ground for upholding the judgment below. Moreover, to decide the Question Presented on the assumption that securities industry arbitration *does* provide an adequate forum would artificially divorce this case from the pertinent factual circumstances that gave rise to it.

The broad question whether Title VII precludes enforcement of individual employment contracts requiring arbitration of statutory claims in a forum adequate to protect statutory rights should be decided in the context of a case involving such a forum. The adequacy of securities industry arbitration, by contrast, is not an issue worthy of this Court's review—not the least because the current system will soon cease to exist.

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ties employer defendants and their *amici* would not be fighting so hard to retain unilaterally imposed arbitration, and Title VII claimants and their *amici* would not be fighting so hard to eliminate it.

[10] *See EEOC, Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment* (July 11, 1997); EEOC *Amicus Curiae* Brief to the Ninth Circuit in Support of Ms. Duffield; National Academy of Arbitrators' Statement and Guidelines, 103 Daily Lab. Rep. (BNA) E-1 (May 29, 1997); National Academy of Arbitrators' *Amicus Curiae* Brief to the Ninth Circuit in Support of Ms. Duffield.

B. Another possible answer to the Question Presented is that Title VII preludes compulsory arbitration where such a requirement is imposed not just by a particular employer, but across the board by all employers in an industry as a condition of pursuing employment in that industry as a whole. The right to pursue one's chosen profession is so fundamental as to be a protected "liberty" interest under the Fourteenth Amendment. *See Green v. McElroy*, 360 U.S. 474, 492 (1959). Ms. Duffield argued below that her "agreement" to arbitrate could not be considered "voluntary" because her execution of the Form U-4 arbitration clause was an explicit, non-negotiable condition—imposed by federal law and the rules of the exchanges, as well as by her employer—of her working for *any* U.S. securities industry employer. *See* Opening Brief of Plaintiff-Appellant in the Ninth Circuit at 28-30.[11]

Despite Robertson Stephens' assertions to the contrary, the Ninth Circuit was correct that pre-dispute arbitration agreements encompassing Title VII claims are not "appropriate and . . . authorized by law" unless they are entered into voluntarily. This Court has long recognized

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[11] The Ninth Circuit thus began its decision by observing that Ms. Duffield's case "presents the issue whether employers may require as a mandatory condition of employment *in a chosen profession*—here, broker-dealer in the securities industry—that all employees waive their right to bring . . . claims in court . . . ." Pet. App. 9 (emphasis added).

In *Gilmer*, which pre-dated the effective date of the Civil Rights Act of 1991, this Court acknowledged that the plaintiff was required to sign a Form U-4 and register with an exchange, but suggested that the plaintiff might not have been required to sign the *arbitration clause* in the Form U-4. 500 U.S. at 33 (stating that there was "no indication that Gilmer . . . was coerced . . . into agreeing to *the arbitration clause in his registration application*"). This statement suggests that the *Gilmer* majority believed, contrary to the undisputed facts in the present record, that securities industry registered representatives had a choice whether to agree to the arbitration clause contained in the Form U-4, even if they had no choice whether to sign the Form U-4 itself.

that "arbitration . . . is a matter of consent, not coercion." *See, e.g., Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 81 (1995), *quoting Volt Info Sciences, Inc. v. Bd. of Trustees*, 489 U.S. 468, 479 (1989). Moreover, the legislative history of the 1991 Civil Rights Act (reviewed at Pet. App. 35a-45a), makes absolutely clear that Congress did not intend agreements covering Title VII employment claims to be enforced unless they were entered into voluntarily and with full knowledge of the employee.[12]

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[12] While this Brief in Opposition is not the place to re-argue the Ninth Circuit's legislative history analysis, the Court should be aware that several courts have recently echoed the Ninth Circuit's conclusion that agreements to arbitrate statutory discrimination claims must be voluntary. *See, e.g., Bercovitch v. Baldwin Schools, Inc.*, 133 F.3d 141, 149 (1st Cir. 1998) (noting that "the legislative history [of the ADA, which is parallel to Title VII] evidences a concern that agreements to arbitrate should be voluntary"); *id.* at 150 (emphasis in original) ("the legislative . . . history expresses a concern for *involuntary* agreements to arbitrate"); *Ramirez-De-Arellano v. American Airlines, Inc.*, 133 F.3d 89, 90 (1st Cir. 1997) ("the threshold question for review must always be whether the agreement to arbitrate was, indeed, voluntary and intentional"). As Judge Posner explained for the Seventh Circuit in refusing to compel arbitration of a statutory discrimination claim pursuant to a collectively-bargained arbitration clause, "[i]t would be at least a mild paradox for Congress, having in another amendment to Title VII in 1991 conferred a right to a trial by a jury for the first time" to have intended to allow workers to be deprived of that right without their consent. *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 363 (7th Cir.), *cert. denied*, 118 S.Ct. 294 (1997).

Moreover, Robertson Stephens' reliance on the floor comments of Senator Dole and Representative Hyde (Pet. 22)—two legislators who *opposed* § 118—ignores Sen. Dole's explicit statement that Congress intended to permit arbitration of Title VII claims only "where the parties *knowingly* and *voluntarily* elect to use these methods" (137 Cong. Rec. S15472, S15478 (daily ed. Oct. 30, 1991) (emphasis added)), and Rep. Hyde's similar assertion that the 1991 Civil Rights Act was meant to encourage statutory arbitration only where "the parties *knowingly* and *voluntarily* elect" to submit their dispute to such procedures. 137 Cong. Rec. H9548 (daily ed. Nov. 7, 1991) (emphasis added).

Ms. Duffield has the *strongest* possible case that her consent to arbitration was not voluntary. As the Ninth Circuit stated:

> Because *every* employer in the securities industry requires its employees to sign Form U-4, the form is *especially* violative of Congress' limitations. . . . It forces individuals like Ms. Duffield to opt for one of two "choices": sign the Form U-4 or seek another profession." [Pet. App. 46a (emphases added).]

The "choice" faced by Ms. Duffield was not simply whether to work for one employer or another, but whether to work in her chosen profession at all. Because that is the strongest possible context for finding a lack of voluntariness, it is also the least likely context to result in a decision applicable to the vast majority of workers currently bound by pre-dispute arbitration agreements. If the Court should decide to grant certiorari to decide the "voluntariness" question posed by Robertson Stephens, it should do so in a case presenting the more difficult factual context of an individual employer's arbitration requirement, which is the factual context applicable to most workers covered by mandatory arbitration "agreements." Otherwise, the risk exists that the Court's decision would be directly pertinent only to a securities industry arbitration requirement that will soon no longer exist.[13]

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[13] Toward the end of its Petition, Robertson Stephens asks this Court to grant certiorari in order to decide the enforceability of arbitration agreements *outside* the securities industry context. Pet. 29 n.14. However, not only are those contexts not raised by the facts of this case, but there are also two other pertinent legal distinctions between mandatory securities industry arbitration and arbitration under employment contracts requiring arbitration as a condition of employment.

First, the Federal Arbitration Act, which Robertson Stephens relies upon so heavily in its Petition for Certiorari, is applicable to the securities industry Form U-4, but may not be applicable to contracts of employment. *See Gilmer*, 500 U.S. at 25 n.2 ("leav[ing] for another day" the question whether the FAA applies to employment contracts); *id.* at 36 (Stevens, J. dissenting) (explaining why

III. THE CONFLICT AS TO THE QUESTION PRESENTED MAY WELL RESOLVE ITSELF AND, EVEN IF IT DOES NOT, THIS COURT WOULD BENEFIT FROM THE VIEWS OF OTHER CIRCUITS.

The Petition for Certiorari exaggerates the extent of the conflict on the Question Presented. In the first place, nothing in the Ninth Circuit's decision conflicts with *Gilmer* itself, which pre-dated the effective date of the 1991 Civil Rights Act amendments and which invited fact-based challenges to the adequacy of mandatory arbitration schemes. In addition, the Ninth Circuit in the present case was the first federal circuit court to consider in depth the legislative history of the Civil Rights Act of 1991 in the context of a challenge to the enforceability of an involuntary arbitration agreement encompassing statutory claims. Since that decision issued, the Third Circuit reached a different conclusion (*see* Pet. 11-12 n.5, *citing Seus v. John Nuveen & Co.*, 146 F.3d 175 (3d Cir. 1998)), while other circuits have yet to weigh in on the Ninth Circuit's analysis—although cases squarely presenting the issue (as well as the other grounds upon which

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the FAA does *not* apply to such contracts). Robertson Stephens' request that the Court hear this case to provide "guidance . . . on the application of the Federal Arbitration Act . . . to statutory discrimination claims" (Pet. 2), ignores that this Court has left open the threshold question whether the FAA applies to employment contracts at all.

Second, the securities industry arbitration requirement was attributable *to the government* (at least as of 1993 when the SEC adopted a regulation requiring securities traders to register with a national securities exchange). *See* Conditional Cross Petition for Certiorari in No. 98-409. That requirement therefore imposed an unconstitutional condition of employment in the industry—a separate ground for affirming the judgment below that has no application outside the context of the United States securities industry (as it existed before the recent NASD and NYSE rule changes).

Ms. Duffield challenged securities industry arbitration in this case) are pending in at least three other circuits.[14]

The *Seus* decision, moreover, is plainly inconsistent with *Gilmer* (and with the position of the EEOC, the federal agency with jurisdiction to enforce Title VII). The Third Circuit in *Seus* refused to consider the 1991 legislative history or indicia of legislative purposes relied upon by the Ninth Circuit, concluding that § 118 on its face endorsed arbitration and that "no amount of commentary from individual legislators or committees would justify a court in reaching the result [urged by the EEOC and adopted by the Ninth Circuit]." 146 F.3d at 182. This Court held in *Gilmer*, however, that a congressional intent to preclude a compelled waiver of the right to litigate statutory claims in court may be found in the text of a statute, *in its legislative history, or in an inherent conflict between compulsory arbitration and the statute's underlying purpose. Gilmer*, 500 U.S. at 26. The *Seus* court also denied the plaintiff in that case discovery into the actual workings of the securities industry arbitration system (146 F.3d at 187-88), thus precluding her from creating a record establishing the inadequacy of securities industry arbitration in actual practice. The absence of such a record may well have affected the Third Circuit's perception of the importance of ensuring that pre-dispute agreements to arbitrate Title VII claims are voluntary.

In any event, the present conflict may well be resolved once this Court decides *Wright v. Universal Maritime*

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[14] *See, e.g., Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 1st Cir. No. 98-1426; *Desiderio v. NASD, Inc.*, 2d Cir. No. 98-6100; *Koveleskie v. SBC Capital Markets, Inc.*, 7th Cir. No. 98-1793. These are all securities industry cases, and like Ms. Duffield's case, they may shortly become moot as to the arbitrability issue. Although Robertson Stephens cites several other cases in support of its argument that a circuit conflict exists, none of them addressed the arguments based on the 1991 Civil Rights Act amendments or the other fact-based challenges that Ms. Duffield presented in this case.

Service Corp., No. 97-889, *cert. granted*, 118 S.Ct. 1162 (1998). The issue in *Wright* is whether a worker can be compelled to arbitrate a statutory claim of discrimination under the Americans with Disabilities Act pursuant to an arbitration clause in a collective bargaining agreement. Section 118 of the Civil Rights Act of 1991 (encouraging arbitration "where appropriate . . . and authorized by law") is also applicable to claims under the Americans with Disabilities Act. In *Wright*, both the respondent and the United States as *amici curiae* have briefed the voluntariness issue in the context of Congress' intent in adopting § 118. *See* Brief for Respondents and Brief for United States as *amici curiae* in No. 97-889. The Court's decision in *Wright* may therefore shed sufficient light on § 118 to resolve, or permit lower courts to resolve, any dispute over the Question Presented by Robertson Stephens. Even if the conflict persists, there will be other vehicles for resolving that question (*see, e.g.*, n.14, *supra*), and this Court would likely have the benefit of federal circuit decisions considering both the Ninth Circuit's analysis and the *Wright* decision.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

Proposed Changes to New York Stock Exchange Arbitration Rules

Rule 347.

(a) Except as provided in paragraph (b), [A]*any* controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules.

(b) A claim alleging employment discrimination, including any sexual harassment claim, in violation of a statute shall be eligible for arbitration only where the parties have agreed to arbitrate the claim after it has arisen.

Rule 600.

(f) Any claim alleging employment discrimination, including any sexual harassment claim, in violation of a statute shall be eligible for submission to arbitration under these Rules only where the parties have agreed to arbitrate the claim after it has arisen.

Brackets indicate deleted language; italics indicate new language.

Source: *Securities Week,* Vol. 25, No. 36 at 4 (Sept. 7, 1998)

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No. 98-237

In The
Supreme Court of the United States
October Term, 1998

ROBERTSON, STEPHENS & COMPANY,
Petitioner,

v.

TONYJA DUFFIELD,
Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For the Ninth Circuit

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR *CERTIORARI*

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICUS 1

SUMMARY OF THE FACTS 2

SUMMARY OF THE ARGUMENT 3

ARGUMENT 4

I. The *Duffield* Decision Below Misread the Text, Legislative History and Purpose of Section 118. 4

A. The Ninth Circuit's Use of Legislative History Rewrote the Plain Meaning of Section 118. 4

B. Congress Was, In Fact, Aware of the *Gilmer* Decision When It Passed the CRA 8

C. The Underlying Purpose of the CRA Evinces No Congressional Intent to Preclude Pre-Dispute Arbitration. 10

II. The *Duffield* Decision Below Ignored a Presumption of Statutory Construction Enunciated by This Court, As Well As Subsequent Legislative Activity in Congress 11

A. Congress Is Presumed to Know the Court's Interpretation of the Law as It Exists at the Time Legislation Is Passed 11

B. Subsequent Congressional Efforts to Amend the CRA Demonstrate Congress's Understanding That Current Law Does Not Preclude Pre-Dispute Arbitration Agreements. 12

III. Contrary Views Among the Courts of Appeals and the Equal Employment Opportunity Commission Make this Case Particularly Appropriate for *Certiorari*. 13

A. Employers Have a Strong Interest in the Resolution of this Case Because Until Now the Courts of Appeals Have Held That Most Workplace Arbitration Agreements Are Governed by the Federal Arbitration Act..... 13

B. The Court Should Provide Definitive Guidance With Respect to Employment Discrimination Legislation..... 15

C. The Employer Community Is Increasingly Turning to Alternative Dispute Resolution, Including Arbitration, to Resolve Employment Disputes. 16

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 6, 9, 10

Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229 (5th Cir. 1991) 13

Armijo v. Prudential Insurance Co. of America, 72 F.3d 793 (10th Cir. 1995) 15

Asplundh Tree Expert Co. v. Bates, 71 F.3d 592 (6th Cir. 1995) 14

Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698 (11th Cir. 1992) 13

Cannon v. University of Chicago, 441 U.S. 677 (1979) 12

Cole v. Burns Int'l Security Services, 105 F.3d 1465 (D.C. Cir. 1997) ..... passim

Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987) 10

Dickstein v. duPont, 443 F.2d 783 (1st Cir. 1971) 14

Duffield v. Robertson, Stephens & Company, 144 F.3d 1182 (9th Cir. 1998) ..... passim

Erving v. Virginia Squires Basketball Club, 468 F.2d 1064 (2d Cir. 1973) 14

Evans v. Jeff D., 475 U.S. 717 (1986) 10

Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998) 12

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995) 8

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Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) ..... passim

Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1990) 11

Great Western Mortgage Corp. v. Peacock, 110 F.3d 222 (3d Cir.) *cert. denied*, 118 S. Ct. 299 (1997) 14

Independent Federation of Flight Attendants v. Zipes, 491 U.S. 754 (1989) 10

Keene Corp. v. United States, 508 U.S. 200 (1993) 12

Landgraf v. USI Film Products, 511 U.S. 244 (1994) 6, 9

Library of Congress v. Shaw, 478 U.S. 310 (1986) 10

Lorance v. AT & T Technologies, 490 U.S. 900 (1989) 10

Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932 (9th Cir. 1992) 13

Martin v. Chesny, 473 U.S. 1 (1985) 10

Martin v. Wilks, 490 U.S. 755 (1989) 10

McWilliams v. Logicon, Inc., 143 F.3d 573 (10th Cir. 1998) 14

Miles v. Apex Marine Corp., 498 U.S. 19 (1990) 11

Miller Brewing Co. v. Brewery Workers Local Union No. 9, AFL-CIO, 739 F.2d 1159 (7th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985) 14

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 7

Mouton v. Metropolitan Life Insurance Co., 147 F.3d 453 (5th Cir. 1998) 2, 15

Oncale v. Sundowner Offshore Services, Inc., 118 S. Ct. 998 (1998) 9

Paladino v. Avnet Computer Tech Inc., 134 F.3d 1054 (11th Cir. 1998) 14

Patterson v. McLean Credit Union, 491 U.S. 164 ..... 10, 15

Patterson v. Tenet Healthcare, Inc., 113 F.3d 832 (8th Cir. 1997) 2

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) 10

Pryner v. Tractor Supply Co., 109 F.3d 354 (7th Cir. 1997) 13

Rivers v. Roadway Express, 511 U.S. 298 (1994) 15

Rodriguez de Quijas v. Shearson/American Express Inc., 490 U.S. 477 (1989) 7

Rojas v. TK Communications, Inc., 87 F.3d 745 (5th Cir. 1996) 14

Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 995 F. Supp. 190 (D. Mass. 1998) 2

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Wright v. Universal Maritime Service Corp., cert. granted, 118 S. Ct. 1162 (U.S. March 2, 1998) (No. 97-889) 1

STATUTES

42 U.S.C.A. § 1981 (West 1994) 5

Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq 4, 5, 9, 13

Americans with Disabilities Act, 42 U.S.C. §§ 12111 et seq 5

Civil Rights Act of 1870, 42 U.S.C. § 1981 5

Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071 (1991) 5

Federal Arbitration Act, 9 U.S.C. §§ 1 et seq. .....passim

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. 5, 9

LEGISLATIVE MATERIALS

137 Cong. Rec. H9530 (daily ed. Nov. 7, 1991) (statement of Representative Don Edwards).....9

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OTHER AUTHORITIES

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INTEREST OF THE AMICUS[1,2]

The Chamber of Commerce of the United States ("the Chamber") is the world's largest business federation. The Chamber has substantial membership in each of the 50 states, and through its federation of members represents more than 3,000,000 businesses and professional organizations of every size and in every sector of the economy. The Chamber, therefore, serves as the principal voice of American employers.

Among its activities, the Chamber represents the interests of members on matters pending before the judiciary and the other branches of government. The Chamber has participated as an *amicus curiae* in numerous cases before this Court, including cases similar to this case, such as *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) and *Wright v. Universal Maritime Service Corp., cert. granted*, 118 S. Ct. 1162 (U.S. March 2, 1998) (No. 97-889).

Since the Court decided *Gilmer* more than seven years ago, many of the Chamber's members have adopted alternative dispute resolution ("ADR") programs for their employees, including arbitration. An increasing number of those employers require employees to agree to arbitration before a dispute arises, in order to obtain employment. Still more employers are developing or considering ADR

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[1] The Chamber hereby certifies, in accordance with Supreme Court Rule 37.6, that no counsel for a party authored this brief in whole or in part, and no person or entity other than the Chamber of Commerce of the United States, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

[2] Letters from the Parties' counsel, stating their consent to the Chamber's participation as an *amicus curiae*, are attached, in accordance with Supreme Court Rule 37.2(a).

programs, which may include pre-dispute arbitration agreements.

The decision of the U.S. Court of Appeals for the Ninth Circuit below conflicts with subsequent decisions of two Circuits.[3] The *Duffield* decision also conflicts with the previous decisions of at least two other Circuits.[4] It has left employers uncertain about the enforceability of arbitration agreements as they apply to employment discrimination claims, in both the Ninth Circuit and in other Circuits that have yet to address the issue.[5]

A definitive ruling from this Court on the issue presented in the petition for *certiorari* would not only resolve the dispute between the parties, but also would provide guidance to the entire employer community regarding when, and to what extent, agreements to arbitrate claims arising under Title VII and other employment discrimination statutes are legally binding. Consequently, the Chamber urges the Court to grant *certiorari* to consider the important issue raised in this case.

SUMMARY OF THE FACTS

Tonyja Duffield, a successful and sophisticated securities broker, brought this action against her former employer, Robertson, Stephens & Co., alleging employment discrimination on the basis of sex. Robertson, Stephens moved to compel arbitration of her claims, in accordance with

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[3] *See Mouton v. Metropolitan Life Ins. Co.*, 147 F.3d 453 (5th Cir. 1998); *Seus v. John Nuveen & Co.*, 146 F.3d 175 (3d Cir. 1998).

[4] *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832 (8th Cir. 1997); *Cole v. Burns Int'l Sec. Svcs.*, 105 F.3d 1465 (D.C. Cir. 1997).

[5] An additional case, which is consistent with *Duffield*, is pending before the U.S. Court of Appeals for the First Circuit. *See Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 995 F. Supp. 190 (D. Mass. 1998), *appeal pending*.

the arbitration agreement contained in her application for licensure as a securities broker[6] and her employment contract.

The U.S. District Court for the Northern District of California agreed that Ms. Duffield's employment discrimination claims were subject to arbitration as a matter of contract, but certified the question of whether the Civil Rights Act of 1991 ("CRA") precludes arbitration to the U.S. Court of Appeals for the Ninth Circuit. On May 8, 1998, Judge Stephen Reinhardt issued an opinion for the court stating that the legislative history of the CRA demonstrated that the U.S. Congress intended to preclude compulsory agreements to submit Title VII claims to arbitration. *See* 144 F.3d 1182 (9th Cir. 1998). Therefore, Ms. Duffield did not have to arbitrate her Title VII and related state law discrimination claims.

Robertson, Stephens & Co. timely filed a petition for *certiorari* seeking to overturn the Ninth Circuit's decision. As discussed below, the Chamber supports this petition.

SUMMARY OF THE ARGUMENT

The Ninth Circuit interpreted a provision of the CRA that states that employers and employees are "encouraged" to use various ADR methods to resolve employment discrimination claims, and concluded that this provision actually *prohibits* enforcement of agreements to arbitrate, when such agreements are made before a dispute arises. Its opinion is based upon a selective and forced reading of the legislative history of Section 118 of the CRA. Because this Court, in *Gilmer*, endorsed the use of ADR to resolve age discrimination claims

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[6] The application, known as the U-4, is an agreement similar to the agreement that Robert Gilmer (petitioner in the *Gilmer* case) and thousands of other securities brokers have signed as a condition of their registration with the New York Stock Exchange and the National Association of Securities Dealers.

during Congress's debate on the CRA, the legislative history of Section 118 is far from clear. A fair and reasonable reading of the legislative history indicates that different Members of Congress understood the provision differently, at different times. In this circumstance, the Court should avoid relying on legislative history and instead apply the plain meaning of the statute, as passed by the full Congress. Otherwise, this Court might approve an interpretation that the statute means almost the opposite of what it says.

Given the unhelpful nature of the CRA's legislative history, and the strong interest in ensuring that those who are bound by the law can understand what it requires of them, the Court should grant *certiorari*. It is critical for employers that the Court consider whether Section 118 of the CRA means what it says, as two other Circuits have held, or whether – based on the sketchy, contradictory, and inconclusive comments of various legislators – Section 118 somehow precludes pre-dispute arbitration agreements for employment discrimination claims.

ARGUMENT

I. The *Duffield* Decision Below Misread the Text, Legislative History and Purpose of Section 118.

A. The Ninth Circuit's Use of Legislative History Rewrote the Plain Meaning of Section 118.

Despite the Ninth Circuit's proclaimed reliance upon this Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), which enforced arbitration of a claim under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* ("ADEA"), the appeals court reached the opposite result with respect to a claim under Title VII of the

Civil Rights Act of 1964 ("Title VII"), as amended by the Civil Rights Act of 1991.[7]

Section 118 of the CRA states:

> ALTERNATE MEANS OF DISPUTE RESOLUTION. Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is *encouraged* to resolve disputes arising under the Acts or provisions of Federal law amended by this title. (emphasis added).[8]

Pub. L. 102-166, 105 Stat. 1071, 1081 (1991), *reprinted in* the notes to 42 U.S.C.A. § 1981 (West 1994). Judge Reinhardt concluded that this language evinces a Congressional intent to preclude pre-dispute arbitration agreements as they apply to Title VII claims.

Relying principally on two U.S. House of Representatives Committee Reports, prepared near the time that the legislation was drafted, this conclusion rests on an erroneous interpretation of the CRA's legislative history. Moreover, reliance upon legislative history is both unnecessary and inappropriate in this case.

The Court issued the *Gilmer* decision on May 13, 1991. The U.S. Senate passed the CRA on October 30, 1991. The House of Representatives passed the CRA on November 7,

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[7] 42 U.S.C.A. §§ 2000e *et seq.* (West 1994).

[8] The major civil rights statutes amended by the CRA are: the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.*; the Civil Rights Act of 1870, 42 U.S.C. § 1981; Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*; and the Americans with Disabilities Act, 42 U.S.C. §§ 12111 *et seq.*

1991. President Bush signed the CRA into law on November 21, 1991. Therefore, *Gilmer* predates the passage of the CRA by almost six months. Nevertheless, the Ninth Circuit relied upon Committee Reports issued before, and a few days after, *Gilmer* to conclude that Congress intended to codify the Court's earlier decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).[9] *Gardner-Denver* had held that arbitration agreements contained in collective bargaining agreements do not preclude Title VII employment discrimination claims brought in court.

This reasoning is flawed, for a variety of reasons. Most troubling for employers charged with following the law is the appeals court's willingness to look beyond the plain meaning of the statute to "discover" alternative meanings. As this Court has noted, "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994) (rejecting retroactive application of the CRA absent a clear Congressional intent to apply the new statute retroactively).

Also problematic, the statutory phrase "to the extent authorized by law" does not necessarily refer to either *Gardner-Denver* or *Gilmer*. It could refer to arbitration of statutory disputes *generally*. At the time that the CRA was drafted, there was ample law supporting the use of arbitration

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[9] No Senate Committee Report was issued on the bill that became the CRA. However, two House Committees issued reports approving the bill. *See* H.R. Rep. No. 40(I), 102d Cong., 1st Sess. (April 24, 1991) (Education and Labor Committee); H.R. Rep. No. 40(II), 102d Cong., 1st Sess. (May 17, 1991) (Judiciary Committee).

to resolve statutory disputes, albeit not disputes arising under the civil rights laws.[10]

Furthermore, Judge Reinhardt acknowledged that Section 118 "does not automatically lend itself to a fixed definition. It most likely codifies the 'law' as Congress understood it at the time it either *drafted* or *passed* the provision." 144 F.3d at 1194 (emphasis added). The Ninth Circuit never analyzed, however, which point in time should prevail for statutory interpretation purposes when, as here, Congress drafts and then passes a cross-reference to decisional law, which changes significantly in the interim. The Ninth Circuit's focus on the Committee Reports at the drafting stage is misplaced in this unusual context of a cross-reference provision coupled with an intervening change in the law.

In this context, the focus should be on the point in time when legislation is passed by Congress as a whole. Given the sequence of events here, "no amount of commentary from individual legislators or committees" should undo "[t]he text adopted by the full Congress." *Seus*, 146 F.3d at 182.

The text of Section 118 shows that Congress in fact intended to "encourage" arbitration of employment discrimination claims. Clearly, Congress also entrusted enforcement, in appropriate circumstances, to the courts. A case-by-case determination of "appropriate circumstances" is

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[10] *See, e.g.*, the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* ("FAA"); *Rodriguez de Quijas v. Shearson/American Express Inc.*, 490 U.S. 477 (1989) (Securities Act claims are arbitrable under the FAA); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (Racketeer Influenced and Corrupt Organizations Act claims are arbitrable under the FAA); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (Sherman Act claims are arbitrable under the FAA). *Gilmer* advanced this established policy in favor of arbitration of statutory claims in the midst of the lengthy debate on the CRA.

eminently suited to the judicial function. *See Gilmer*, 500 U.S. at 26 (courts determine arbitrability – mindful that federal policy favors arbitration and that the party opposing it bears the burden to show Congressional preclusion as to statutory claims).[11]

The Ninth Circuit's interpretation of Section 118 contradicts what the provision states in straightforward and understandable language. Congress *wanted* employers and employees to utilize ADR. The *Duffield* decision creates confusion for those the law was intended to regulate, *i.e.*, the parties who were "encouraged" to adopt arbitration clauses and other ADR programs by the CRA and by *Gilmer*.

B. Congress Was, In Fact, Aware of the *Gilmer* Decision When It Passed the CRA.

The legislative history of the CRA, as well as a comprehensive review of the Congressional Record for 1991, demonstrate that Congress was, in fact, aware of the *Gilmer* decision, and had analyzed its effect before the full Congress passed the CRA. References to *Gilmer* appear in the statements issued by both the majority and minority in Congress when the engrossed legisiation was transmitted to President Bush for his signature. The problem is that their positions on *Gilmer* are contradictory. *Compare* 137 Cong. Rec. S15472, S15478 (daily ed. Oct. 30, 1991) (statement of Senator Robert Dole) (arbitration encouraged where parties knowingly and voluntarily elect to use those methods, in accordance with *Gilmer*), and 137 Cong. Rec. H9548 (daily ed. Nov. 7, 1991) (statement of Representative Henry Hyde)

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[11] *See also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (courts determine the arbitrability of parties' dispute unless the parties clearly and unmistakably submitted that issue to arbitration).

(same) *with* 137 Cong. Rec. H9530 (daily ed. Nov. 7, 1991) (statement of Representative Don Edwards) (rejecting *Gilmer* as applied to Title VII claims and stating that Section 118 applies only to agreements entered into after an employment discrimination dispute has arisen).

Additional references to the decision appear elsewhere in the Congressional Record of 1991. For example, the House Select Committee on Aging held hearings to discuss the impact of *Gilmer* on September 24, 1991, more than a month before the full House passed the CRA.[12]

Yet, reliance upon individual legislators' views is inappropriate. Canvassing the legislative history to see which Senator or Representative thought Section 118 embraced *Gardner-Denver* and which Senator or Representative thought the provision embraced *Gilmer* would be fruitless. "...[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Services, Inc.*, 118 S. Ct. 998, 1002 (1998) (holding that the plain language of Title VII prohibits same-sex sexual harassment, despite the argument that Congress did not intend such a broad meaning when it passed the statute). Relying on the ambiguous and conflicting statements of individual legislators – conceivably with 435 different views in the House and 100 in the Senate – is a misuse of legislative history. See *Landgraf*, 511 U.S. at 262-263 (noting that "frankly partisan" statements about the meaning of the CRA's final language could not possibly be

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[12] *See* H.R. Rep. 102-1093, Activities of the House Select Committee on Aging in the 102nd Congress, December 31, 1992, page 49 (stating, "The Committee also examined the impact of the U.S. Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, No. 90-18 (May 13, 1991))." However, the House Select Committee on Aging reported no conclusion about the relationship between *Gilmer* and Section 118 of the CRA, which – by its terms – applies to the ADEA.

read as general agreement; rather, they suggest an agreement to disagree).[13]

The only meaningful conclusion to be drawn from the legislative record here is that, although some legislators *may* have understood Section 118 to embrace *Gardner-Denver* at the time that the CRA was drafted, disagreement prevailed about whether *Gilmer* expanded arbitration of employment discrimination claims at the time of passage.

C. The Underlying Purpose of the CRA Evinces No Congressional Intent to Preclude Pre-Dispute Arbitration.

It is ironic that the Ninth Circuit read a provision of the CRA that *encourages* the use of ADR to impliedly overrule this Court's decision in *Gilmer*. The CRA was passed in response to several Supreme Court decisions interpreting the civil rights laws, in particular *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). *See* Pub L. 102-166, 105 Stat. 1071 (1991).[14] It is illogical to conclude that an Act which

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[13] *See also* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. Cal. L. Rev. 845, 861 (1991) (concluding that where "legislative history is vague, or seriously conflicting, do not use it").

[14] According to the House Judiciary Committee Report, on which the Ninth Circuit relied for other points, the CRA also was intended to overrule the Supreme Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); modify the decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); limit the holding of *Martin v. Wilks*, 490 U.S. 755 (1989); overrule *Lorance v. AT & T Technologies*, 490 U.S. 900 (1989); clarify *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754 (1989); and otherwise limit or codify the holdings in *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987), *Evans v. Jeff D.*, 475 U.S. 717 (1986), *Library of Congress v. Shaw*, 478 U.S. 310 (1986), and *Martin v. Chesny*, 473 U.S. 1 (1985). H.R. Report No. 102-40 (II) (May 17,

was explicitly adopted to modify the law enunciated in those decisions *also* overruled, by implication, a new, pro-ADR decision. Moreover, it is bizarre to conclude that Congress sought to accomplish this purpose by including a provision to "encourage" alternative dispute resolution mechanisms. *See Seus v. John Nuveen & Co.*, 146 F.3d 175, 183 (3d Cir. 1998) (flatly rejecting the argument that the "straightforward declaration of the full Congress [in Section 118] can be interpreted to mean that the [FAA] is impliedly repealed with respect to agreements to arbitrate Title VII claims which were executed by an employee as a condition of securing employment").

In sum, the underlying purpose of the Act evinces no Congressional intent to overrule *Gilmer* and to preclude pre-dispute arbitration.

II. The *Duffield* Decision Below Ignored a Presumption of Statutory Construction Enunciated by This Court, As Well As Subsequent Legislative Activity in Congress.

A. Congress Is Presumed to Know the Court's Interpretation of the Law as It Exists at the Time Legislation Is Passed.

The Court cannot assume that Congress is ignorant of the state of the law when Congress passes legislation referencing other law. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1990). Indeed, Congress is presumed to be knowledgeable about existing law pertinent to the legislation that it enacts. *Id. See also Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990). The Court can expect no less of a body of

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1991). *Gilmer*, decided four days before the Report was issued, was not mentioned.

elected representatives than it does of a citizenry presumed to know the law. *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979). When Congress amends a statute in one respect, but provides no modification in another upon which the Court has ruled, the Court presumes that Congress was aware of the judicial interpretation in the latter respect and, in effect, adopted it. *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2286 (1998) *quoting Keene Corp. v. United States*, 508 U.S. 200 (1993); *cf. Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 72 (1992) (holding that Congress ratified the Court's decision in *Cannon v. University of Chicago*, by failing to overturn that decision when it amended the civil rights statute at issue in other respects).

This presumption is a reasonable, appropriate, and necessary one. Without it, statutes would invite continual attack and reinterpretation, and statutory interpretation would devolve into an inconclusive inquiry into the legal knowledge of individual legislators. In essence, this is what happened in the appeals court, which failed to apply the presumption.

Because *Gilmer* constituted "the law" at the time of passage of the CRA, arbitration of statutory discrimination claims was – and is – indeed "authorized by law" and "encouraged" by Section 118.

B. Subsequent Congressional Efforts to Amend the CRA Demonstrate Congress's Understanding That Current Law Does Not Preclude Pre-Dispute Arbitration Agreements.

Since *Gilmer*, and subsequent to the enactment of the CRA, various members of Congress have introduced legislation intended to amend the law to preclude the use of arbitration agreements for claims brought under Title VII and other statutes, such as the Americans with Disabilities Act and

the ADEA.[15] However, none of these initiatives has become law.

Significantly, though, each of these bills has been introduced as an effort to amend, rather than to clarify, the relevant statutes. These efforts further reflect Congress's awareness that the plain language of the CRA simply does not preclude arbitration of employment discrimination claims. The courts generally have agreed. Indeed, prior to Judge Reinhardt's decision in this case, each of the Courts of Appeals to consider the issue, including the Ninth Circuit, shared the view that agreements to arbitrate Title VII claims are enforceable.[16]

III. Contrary Views Among the Courts of Appeals and the Equal Employment Opportunity Commission Make this Case Particularly Appropriate for *Certiorari*.

A. Employers Have a Strong Interest in the Resolution of this Case Because Until Now the Courts of Appeals Have Held That Most Workplace Arbitration Agreements Are Governed by the Federal Arbitration Act.

The Federal Arbitration Act, which embodies the federal policy in favor of arbitration agreements, clearly applies to the facts of this case. *Gilmer*, 500 U.S. at 25, n.2 (finding that the

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[15] *See, e.g.*, H.R. 3748, 104th Cong., 2d Sess. (1996); S. 366, 104th Cong., 1st Sess. (1995); and S. 2012, S. 2327, and H.R. 4981/S. 2405, 103d Cong., 2d Sess. (1994).

[16] *See Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932 (9th Cir. 1992) (interpreting *Gilmer* and concluding that Congress did not intend to preclude Title VII claims); *see also Pryner v. Tractor Supply Co.*, 109 F.3d 354 (7th Cir. 1997); *Cole v. Burns Int'l Sec. Svcs.*, 105 F.3d 1465 (D.C. Cir. 1997); *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698, 700 n.1 (11th Cir. 1992); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229 (5th Cir. 1991).

FAA applied to the securities industry U-4 registration form). Section 1 of the FAA, however, excludes at least some contracts of employment from its scope. 9 U.S.C. § 1 states "...nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Although the Court has never had occasion to decide whether the Section 1 exclusion applies to *all* contracts of employment, *see Gilmer* at 36-37 (Stephens, J. dissenting), nearly every Circuit has determined that the exclusion should be construed narrowly.[17]

In these Circuits, most employment contracts will be held to fall within the scope of the Act. Therefore, although this case directly affects the arbitration agreement used in the securities industry, most employers have a substantial interest in the resolution of the underlying issue of whether the CRA carves out employment discrimination claims from the FAA. *See Seus,* 146 F.3d at 178-179.

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[17] *See McWilliams v. Logicon, Inc.*, 143 F.3d 573 (10th Cir. 1998); *Paladino v. Avnet Computer Tech Inc.*, 134 F.3d 1054, 1069-71 (11th Cir. 1998) (majority concurrence); *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222, 226-27 nn.20-21 (3d Cir.), *cert. denied*, 118 S. Ct. 299 (1997); *Cole v. Burns Int'l Sec. Svcs.*, 105 F.3d 1465 (D.C. Cir. 1997); *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 747-48 (5th Cir. 1996); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 600 (6th Cir. 1995); *Miller Brewing Co. v. Brewery Workers Local Union No. 9, AFL-CIO*, 739 F.2d 1159 1162 (7th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1973); *Dickstein v. duPont*, 443 F.2d 783, 785 (1st Cir. 1971).

B. The Court Should Provide Definitive Guidance With Respect to Employment Discrimination Legislation.

As this Court has noted, adherence to principles of *stare decisis* is particularly important in the context of civil rights legislation, because Congress is always free to overrule the Court's statutory interpretations. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73. Although *Gilmer* is a relatively new precedent, it is not so new, nor its effect so limited, that the validity of the Court's decision should be lightly disregarded. "It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law." *Rivers v. Roadway Express*, 511 U.S. 298, 312 (1994).

Until now, pursuant to *Gilmer* and the FAA, the law on the arbitrability of statutory claims under individual employment agreements was clear. Any ambiguity in such an agreement regarding the arbitrability of a dispute was to be resolved in favor of arbitration. Section 118, by its terms, simply reinforced this principle. *See Mouton v. Metropolitan Life Insurance Co.*, 147 F.3d 453, 456 (5th Cir. 1998) ("'all ambiguities must be resolved in favor of arbitrability'") *quoting Armijo v. Prudential Insurance Co. of America*, 72 F.3d 793, 798 (10th Cir. 1995); *see also Seus v. John Nuveen & Co.*, 146 F.3d 175, 180 (3d Cir. 1998).

Nonetheless, the Ninth Circuit's decision here, and the position taken by the Equal Employment Opportunity Commission ("EEOC"), have led to confusion and uncertainty regarding the use of pre-dispute arbitration agreements in the non-unionized workplace.

The EEOC, which participated in the proceedings below as an *amicus curiae*, has taken the position that Section 118 evinces a Congressional intent to preclude pre-dispute

arbitration agreements for Title VII claims. In addition, the EEOC has taken the position that arbitration of claims under the Americans with Disabilities Act and the Age Discrimination in Employment Act is likewise unenforceable. 1997 EEOC Policy Statement, No. 915.002, July 10, 1997. Furthermore, the agency has made it a priority to participate in cases in which pre-dispute arbitration agreements are invoked, seeking to invalidate those agreements. *See* Equal Employment Opportunity Commission National Enforcement Plan, posted at www.eeoc.gov/nep.html (listing cases challenging obligations to arbitrate among the agency's top priorities) (last updated on January 15, 1997). The Ninth Circuit's opinion in this case, coupled with the EEOC's commitment to challenging pre-dispute arbitration agreements as unenforceable when applied to statutory civil rights claims, make it certain that courts will now disagree about this issue, unless the Court grants *certiorari* and provides definitive guidance.

C. The Employer Community Is Increasingly Turning to Alternative Dispute Resolution, Including Arbitration, to Resolve Employment Disputes.

Employers, reasonably believing that arbitration can more swiftly and cost-effectively resolve employee disputes – and improve employee relations – are increasingly turning to ADR, including mandatory arbitration. Arbitration agreements, implemented so as to preserve the substantive rights of those they protect, should not be discouraged. *See Cole*, 105 F.3d at 1482-83.

According to the United States General Accounting Office ("GAO"), in 1994 an estimated 52 percent of large employers (defined as those with more than 100 employees) utilized some type of alternative dispute resolution process to resolve discrimination complaints. Roughly 80 percent of those

employers used mediation, about 39 percent used peer review panels, and approximately 19 percent used arbitration. *See U.S. General Accounting Office, Employment Discrimination: Most Private-Sector Employers Use Alternative Dispute Resolution*, GAO/HESH-95-150, (July 5, 1995).[18] According to the GAO study, employer interest in alternative dispute resolution grew correspondingly with the volume of discrimination charges filed with the EEOC and the length of time for the agency to complete its review of each charge.[19] Other scholars have noted an increasing willingness on the part of employers to develop ADR programs in order to reduce legal fees, decrease turnover, and improve employee relations. *See, e.g.,* John Zinsser, *Employment Dispute Resolution Systems: Experience Grows But Some Questions Persist,* Negotiation J. (April 1996) at 151, 153 (discussing Brown & Root's motivation for developing a four-step mandatory dispute resolution program, which can culminate in arbitration).

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[18] This publication is available through the GAO website at www.gao.gov.

[19] The number of discrimination charges filed with the EEOC grew by 43 percent between fiscal years 1991 and 1994. By fiscal 1997, the average time to process a charge of discrimination was 358 days. *Summary of Enforcement Data and Budget and Staffing Information for the EEOC: FY 1991 through FY 1997*, Office of Communications and Legislative Affairs, Equal Employment Opportunity Commission (December 8, 1997). In order to reduce its backlog, the agency adopted a "triage" system to dispose of many charges on an expedited basis. The EEOC announced on August 12, 1998 that it has cut its inventory of discrimination charges almost in half – from almost 111,000 charges in 1995 to just under 58,000 today. Nonetheless, a lack of funding and a failure to appoint new Commissioners have left practitioners concerned about the agency's continued ability to function. *See* Darryl Van Duch, *Paralysis for EEOC Feared*, Nat'l L. J., August 24, 1998, at 1, 21.

Data regarding the outcomes of arbitration of employment discrimination claims is not yet widely available. Among the employers that have shared data on their ADR programs, however, it is clear that arbitration can achieve a swift resolution of employment discrimination claims, while simultaneously providing employees with inexpensive access to a hearing and a neutral factfinder. For example, Brown & Root found that it was able to cut its legal fees by 40 percent in the first two years of its program, while its cost in settlements and adverse judgments remained steady. In addition, *the company* credited the program with saving its employment relationship with *300 employees*. *Id.* at 161.

Some experts have suggested that alternative dispute resolution overall is more likely to benefit employees – especially those with modest financial resources – than to benefit employers, by expanding employees' access to remedies. Noting that employees often prefer swift, less expensive, private relief to becoming part of "test" cases, three former EEOC officials concluded that, "[t]he reality is that a more informal, simpler, and less confrontational system like ADR will encourage more valid complaints of discrimination to come forward. For many individuals, ADR expands access to the legal system." R. Gaull Silberman, Susan Murphy, and Susan Adams, *Alternative Dispute Resolution of Employment Discrimination Claims*, 54 La. L. Rev. 1533, 1558 (1994).

Thus, ADR is not unfair or one-sided. Professor Theodore J. St. Antoine has observed that employers, too, alter the procedural landscape when they agree to pre-dispute arbitration. Citing the findings of the Commission on the Future of Worker-Management Relations (the "Dunlop Commission"), St. Antoine suggests that employers are unlikely to agree to binding arbitration *after* a dispute is filed in court because, in most cases, the claim will go nowhere or the employer will prevail on summary judgment. As a result, most employees' discrimination cases never reach a judicial

hearing on the merits. "For employers, the desired trade-off [in consenting to pre-dispute arbitration] is the one *big* case against the many smaller ones." Concluding that the majority of ordinary employees may fare better in arbitration than in litigation, he counsels against rejecting pre-dispute arbitration, at least before more empirical evidence is gathered. *See* Theodore J. St. Antoine, *Mandatory Arbitration of Employee Discrimination Claims: Unmitigated Evil or Blessing In Disguise?*, 15 Thomas M. Cooley Law Rev. 1, 8 (1998).

In sum, the increase in mandatory arbitration programs is not only an outgrowth of *Gilmer* and the CRA; it also is a very practical reaction to ever-burgeoning employment discrimination litigation. Arbitration agreements, as long as they provide an accessible, fair, and neutral forum for the resolution of such claims,[20] have proven to be effective in many cases. In the future, they may well become the preferred method of dispute resolution for both employers *and* employees. The Ninth Circuit's tortured interpretation of Section 118, if allowed to stand, will stifle this very positive development for *all* concerned.

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[20] *See Cole*, 105 F.3d at 1483-86 (enforcing a pre-dispute arbitration agreement as to Title VII claim, but interpreting the agreement to provide that the employer pays the arbitrator's fees for both parties).

CONCLUSION

For the foregoing reasons, the Chamber of Commerce of the United States respectfully urges the Court to grant *certiorari*, so that the Court may consider whether Section 118 of the Civil Rights Act of 1991 permits or prohibits the enforcement of pre-dispute arbitration agreements.

Respectfully submitted,

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No. 98-237

In The

Supreme Court of the United States

October Term, 1998

ROBERTSON, STEPHENS & COMPANY,

Petitioner,

v.

TONYJA DUFFIELD,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE EMPLOYERS GROUP AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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16 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. STATEMENT OF INTEREST 1

II. REASONS FOR GRANTING THE PETITION .. 2

A. THE NINTH CIRCUIT'S DECISION CONTRAVENES THE FUNDAMENTAL POLICIES OF THE FEDERAL ARBITRATION ACT BY CREATING A LACK OF FEDERAL UNIFORMITY AND INVITING COSTLY AND DELAYING PRE-ARBITRATION LITIGATION 2

B. THE PETITION ALSO SHOULD BE GRANTED TO CORRECT THE NINTH CIRCUIT'S ERRONEOUS TREATMENT OF STATE LAW DISCRIMINATION CLAIMS 7

III. CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

CASES

Allied-Bruce Terminix Companies, Inc. v. Dobson, 115 S.Ct. 834 (1995).....6, 7

Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875 (4th Cir.), *cert. denied*, 117 S.Ct. 432 (1996).....3

Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981).....8

Battle v. Prudential Insurance Co. of America, 973 F. Supp. 861 (D. Minn. 1997).....5

Beauchamp v. Great West Life Assur. Co., 918 F. Supp. 1091 (E.D. Mich. 1996).....6

Bercovitch v. Baldwin School, Inc., 133 F.3d 141 (1st Cir. 1998).....3

Brookwood v. Bank of America, 45 Cal. App. 4th 1667, 53 Cal. Rptr. 2d 515 (1996).....9

Cione v. Foresters Equity Services, Inc., 58 Cal. App. 4th 625, 68 Cal. Rptr. 2d 167 (1997).....9

Cole v. Burns International Security Services, 105 F.3d 1465 (D.C. Cir. 1997).....4

Cremin v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 957 F. Supp. 1460 (N.D. Ill. 1997).....6

Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985).....8

EEOC v. Frank's Nursery & Crafts, Inc., 966 F. Supp. 500 (E.D. Mich. 1997).....6

EEOC v. Kidder, Peabody & Co., Inc., 1998 U.S. App. LEXIS 21066 (2d Cir. August 28, 1998).....4

TABLE OF AUTHORITIES – Continued

Page(s)

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) 5, 6, 8

Johnson v. Hubbard Broadcasting, Inc., 940 F. Supp. 1447 (D. Minn. 1996) 6

Kuehner v. Dickinson & Co., 84 F.3d 316 (9th Cir. 1996) 8

Matthews v. Rollins Hudig Hall Co., 72 F.3d 50 (7th Cir. 1995) 4

Maye v. Smith Barney Inc., 897 F. Supp. 100 (S.D.N.Y. 1995) 6

Miller v. Public Storage Mgmt., Inc., 121 F.3d 215 (5th Cir. 1997) 3

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 10

Moses H. Cone Memorial Hospital v. Mercury Const. Corp., 460 U.S. 1 (1983) 3, 4

Mouton v. Metropolitan Life Insurance Co., 147 F.3d 453 (5th Cir. 1998) 5

Patterson v. Tenet Healthcare, Inc., 113 F.3d 832 (8th Cir. 1997) 4

Perry v. Thomas, 482 U.S. 483 (1987) 8

Pitter v. Prudential Life Insurance Co. of America, 906 F. Supp. 130 (E.D.N.Y. 1995) 6

Prudential Insurance Co. of America v. Lai, 42 F.3d 1299 (9th Cir. 1994), *cert. denied*, 116 S.Ct. 61 (1995) 5

Renteria v. Prudential Insurance Co. of America, 113 F.3d 1104 (9th Cir. 1997) 5

TABLE OF AUTHORITIES – Continued

Page(s)

Rosenthal v. Great Western Finance Securities Corp., 14 Cal. 4th 394, 926 P.2d 1061 (1996) 3

Seus v. John Nuveen & Co., 146 F.3d 175 (3d Cir. 1998) 3, 5

Spellman v. Securities, Annuities & Insurance Services, Inc., 8 Cal. App. 4th 452, 10 Cal. Rptr. 2d 427 (1992) 9

Topf v. Warnaco, Inc., 942 F. Supp. 762 (D. Conn. 1996) 6

24 Hour Fitness, Inc. v. Superior Court, ___ Cal. App. 4th ___, 98 Daily Journal D.A.R. 10353 (Sept. 30, 1998) 9

STATUTES

Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* 5, 6

Americans with Disabilities Act, 42 U.S.C. § 12212 ... 5, 6

Cal. Arbitration Act, Code of Civil Procedure § 1281 ..... 7, 9

California Fair Employment and Housing Act, Cal. Government Code §§ 12900 *et seq.* ..... *passim*

Civil Rights Act of 1991, Pub. L. 102-166, § 118 .... 6, 7

Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* ... 8, 9

Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.* ... *passim*

Title VII, 42 U.S.C. §§ 2000e *et seq.* ..... *passim*

TABLE OF AUTHORITIES – Continued

Page(s)

OTHER AUTHORITIES

R. STERN, E. GRESSMAN, S. SHAPIRO AND K. GELLER, SUPREME COURT PRACTICE 168 (BNA 7th ed. 1993) 3

Sup. Ct. R. 10 3

BRIEF OF THE EMPLOYERS GROUP AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

This brief is submitted by the Employers Group as *amicus curiae* in support of the petitioner, Robertson, Stephens & Company.[1]

I. STATEMENT OF INTEREST

The Employers Group is a California non-profit corporation whose purpose is to facilitate the exchange of ideas and information concerning personnel and labor relations issues, and to represent its member employers in these areas with respect to legislative, judicial and administrative matters. The Employers Group is the largest California employer association, with over 5,000 member employers of all sizes and in every industry who employ in the aggregate approximately 2.5 million employees.

The Employers Group and its member employers have a substantial interest in this case. The Employers Group's members include securities industry employers who have an obvious interest in the outcome of this case. In addition, many California employers outside the securities industry have adopted alternative dispute resolution procedures for employment disputes whose enforceability is negatively affected by the broad sweep

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[1] This *amicus curiae* brief was funded solely by the Employers Group and authored entirely by counsel for the Employers Group. The parties have consented to the filing of this brief. Copies of the letters of consent have been filed with the Clerk of the Court.

of the Ninth Circuit's holding. Further, many other California employers have contemplated the adoption of arbitration procedures, but have deferred doing so because of uncertainty over the enforceability of such procedures caused by a series of Ninth Circuit decisions culminating in the present case. The Ninth Circuit stands alone among the circuit courts in refusing to enforce agreements to arbitrate Title VII claims. Further, the Ninth Circuit is at odds with California state courts in deciding that agreements to arbitrate are not enforceable as to state law discrimination claims under the California Fair Employment & Housing Act, Government Code §§ 12900 *et seq.* Thus, the Court's decision on the pending Petition will have important ramifications for California employers (as well as all other employers within the Ninth Circuit) both in and out of the securities industry.

The Employers Group is familiar with the questions involved in this case, having previously filed an *amicus* brief in support of Robertson, Stephens with the Ninth Circuit.

II. REASONS FOR GRANTING THE PETITION

A. THE NINTH CIRCUIT'S DECISION CONTRAVENES THE FUNDAMENTAL POLICIES OF THE FEDERAL ARBITRATION ACT BY CREATING A LACK OF FEDERAL UNIFORMITY AND INVITING COSTLY AND DELAYING PRE-ARBITRATION LITIGATION.

It is undisputed that the Ninth Circuit's decision (reported at 144 F.3d 1182) is in direct conflict with the decisions of many of the other circuit courts on the same

matter, one of the "special and important reasons" that favor the granting of a petition for a writ of certiorari under Supreme Court Rule 10. "One of the prime purposes of the certiorari jurisdiction is to bring about uniformity of decisions on these matters among the federal courts of appeals." R. STERN, E. GRESSMAN, S. SHAPIRO AND K. GELLER, SUPREME COURT PRACTICE 168 (BNA 7th ed. 1993). Here, the conflict at issue is particularly significant because it directly implicates the Federal Arbitration Act ("FAA").

One of the purposes of the FAA is to "create a body of federal substantive law of arbitrability" governing arbitration agreements involving commerce. *Moses H. Cone Memorial Hospital v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983). The preemptive nature of the FAA is intended to ensure "[u]niform national application of a federal substantive law. . . . " *Rosenthal v. Great Western Fin. Securities Corp.*, 14 Cal. 4th 394, 409, 926 P.2d 1061 (1996). However, under *Duffield* employers and employees within the Ninth Circuit will be unable to enforce agreements to arbitrate Title VII claims, state law discrimination claims, and potentially other federal statutory discrimination claims. Meanwhile, employees and employers in every other circuit which has addressed the same or an analogous issue (the First, Third, Fourth, Fifth, Seventh, Eighth and District of Columbia Circuits) can enforce such arbitration agreements under the FAA.[2]

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[2] See *Bercovitch v. Baldwin School, Inc.*, 133 F.3d 141, 149 (1st Cir. 1998); *Seus v. John Nuveen & Co.*, 146 F.3d 175, 178-179 (3d Cir. 1998); *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 882 (4th Cir.), *cert. denied*, 117 S.Ct. 432 (1996); *Miller v.*

If *Duffield* is not reviewed by this Court, the FAA will effectively be amended to provide that a written arbitration agreement involving commerce "shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract, except in the Ninth Circuit, where agreements to arbitrate statutory employment discrimination claims are not enforceable." 9 U.S.C. § 2, as "amended" by *Duffield*.

Only by resolving the conflict raised by *Duffield* can the Court ensure that "the federal policy favoring arbitration" embodied in the FAA, *Moses H. Cone*, 460 U.S. at 24, is uniformly applied to arbitration agreements involving commerce throughout all of the states. Otherwise, employers and employees will be faced with conflicting rights and obligations concerning arbitration of statutory employment discrimination claims, and parties within the Ninth Circuit will lose the well-recognized benefits of arbitration that are available to parties to arbitration agreements elsewhere.

In addition to disrupting federal uniformity on the enforceability of arbitration agreements, *Duffield* also creates opportunities for a party to raise pre-arbitration challenges to arbitration agreements on numerous grounds. In this regard, *Duffield* opines in dicta that arbitration agreements are not enforceable as to claims under

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Public Storage Mgmt., Inc., 121 F.3d 215, 218 (5th Cir. 1997); *Matthews v. Rollins Hudig Hall Co.*, 72 F.3d 50, 54 n. 4 (7th Cir. 1995); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 837 (8th Cir. 1997); *Cole v. Burns International Security Services*, 105 F.3d 1465, 1472-73 (D.C. Cir. 1997). Cf. *EEOC v. Kidder, Peabody & Co., Inc.*, 1998 U.S. App. LEXIS 21066 (2d Cir. August 28, 1998).

the Americans with Disabilities Act ("ADA"). 144 F.3d at 1192 n. 10. *Duffield* also suggests that claims under the Age Discrimination in Employment Act ("ADEA") may no longer be arbitrable, based on the Ninth Circuit's erroneous view that this Court did not consider the 1990 amendments to the ADEA when it decided *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). 144 F.3d at 1190 n. 5; but see *Gilmer*, 500 U.S. at 29 ("Congress . . . did not explicitly preclude arbitration or other nonjudicial resolution of claims, even in its recent amendments to the ADEA."). Further, the Ninth Circuit raised but did not rule on Duffield's claims that she did not "knowingly" agree to arbitrate her Title VII claims and that the New York Stock Exchange arbitration system would not adequately protect her statutory rights. 144 F.3d at 1190 n. 7.[3]

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[3] Prior to its decision in *Duffield*, the Ninth Circuit ruled that an agreement to arbitrate is enforceable as to statutory employment discrimination claims only when there is a "knowing" waiver of the judicial forum. See *Renteria v. Prudential Ins. Co. of America*, 113 F.3d 1104 (9th Cir. 1997); *Prudential Insurance Co. of America v. Lai*, 42 F.3d 1299 (9th Cir. 1994), *cert. denied*, 116 S.Ct. 61 (1995). These decisions impose a heightened standard of scrutiny specific to arbitration agreements, and so are contrary to the plain language and central intent of the FAA. As with its holding in *Duffield*, the Ninth Circuit stands virtually alone in imposing a heightened "knowing" standard, as numerous courts have rejected it. See, e.g., *Seus v. John Nuveen & Co.*, 146 F.3d at 183-184 n. 2 ("with respect to the referenced legislative history of section 118 . . . we understand 'knowingly and voluntarily' to invoke ordinary, well established principles of contract law rather than the heightened standard for which [the plaintiff] contends."); *Mouton v. Metropolitan Life Ins. Co.*, 147 F.3d 453 (5th Cir. 1998); *Battle v. Prudential Ins. Co. of America*, 973 F. Supp. 861, 866 (D. Minn. 1997) ("[*Lai*] ignored the clear federal policy favoring

Therefore, *Duffield* expressly or impliedly encourages pre-arbitration litigation with respect to ADA and ADEA claims, as well as broad challenges to the securities industry arbitration system that were seemingly foreclosed by *Gilmer*.

The opportunities for further challenges to arbitration obligations promoted by *Duffield* and prior Ninth Circuit decisions "would doubtless foster pre-arbitration litigation that would frustrate the very purpose of the [FAA]." *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 115 S.Ct. 834, 843 (1995) (O'Connor, J., concurring). In this case, Duffield filed her complaint in January 1995, but the

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arbitration as well as the clear statutory language encouraging arbitration of Title VII claims."); *EEOC v. Frank's Nursery & Crafts, Inc.*, 966 F. Supp. 500, 503-04 (E.D. Mich. 1997) (rejecting *Lai*); *Cremin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 957 F. Supp. 1460, 1474 (N.D. Ill. 1997) ("The prevailing view is that *Lai* is incompatible with [*Gilmer*], ignores core principles of contract law, and inappropriately used legislative history to contradict plain statutory meaning."); *Topf v. Warnaco, Inc.*, 942 F. Supp. 762, 771 (D. Conn. 1996) ("*Lai* is flawed in light of *Gilmer* and federal policies favoring arbitration"); *Johnson v. Hubbard Broadcasting, Inc.*, 940 F. Supp. 1447, 1455 (D. Minn. 1996) (agreeing with "widespread criticism" of *Lai*); *Beauchamp v. Great West Life Assur. Co.*, 918 F. Supp. 1091, 1096 (E.D. Mich. 1996) (Ninth Circuit's heightened "knowing" requirement "flies in the face of the language of [section 118], the Supreme Court's opinion in *Gilmer*, and fundamental principles of contract law."); *Pitter v. Prudential Life Insurance Co. of America*, 906 F. Supp. 130, 139 (E.D.N.Y. 1995) (*Lai* wrongly suggests "that federal law favoring arbitration and requiring liberal construction of arbitration agreements is not applicable to statutory claims of discrimination."); *Maye v. Smith Barney Inc.*, 897 F. Supp. 100, 107 (S.D.N.Y. 1995) ("*Lai* has been criticized by courts in this and other Circuits").

merits of her claims have yet to be litigated (whether in arbitration or the courts) almost four years later. Similar delays can be expected within the Ninth Circuit, and probably other circuits, as parties to arbitration agreements will continue to challenge the enforceability of those agreements on various theories either blessed or encouraged by the Ninth Circuit. The risks of these "kind of costs and delays through litigation" is contrary to the intent of Congress when it wrote the FAA, *Allied-Bruce*, 115 S.Ct. at 841, and it was certainly not the result intended by Congress when it drafted an amendment to Title VII which "encouraged" the use of arbitration to resolve disputes under Title VII.

B. THE PETITION ALSO SHOULD BE GRANTED TO CORRECT THE NINTH CIRCUIT'S ERRONEOUS TREATMENT OF STATE LAW DISCRIMINATION CLAIMS.

The Ninth Circuit also held in *Duffield* that by enacting Section 118 of the Civil Rights Act of 1991, Congress precluded the enforcement of arbitration agreements as to claims brought under **state** anti-discrimination laws. The court reached this conclusion even though Section 118 on its face applies only to Title VII and even though none of the legislative history on which it relied referred to state anti-discrimination laws. *Duffield* nevertheless concluded without cogent explanation that the "FEHA claims are arbitrable to the same extent as Title VII claims." 144 F.3d at 1187 n. 3. The court then relied on its erroneous ruling that Title VII claims are not arbitrable to conclude that FEHA claims are not arbitrable. This conclusion is at odds with the FAA, California's Arbitration

Act, the Supremacy Clause, decisions of this Court, and decisions of the California courts.

Duffield opined that FEHA claims are not arbitrable if Title VII claims are not arbitrable because the laws are "parallel." First, this thesis is incorrect as the FEHA differs in a number of respects from Title VII, including the types of prohibited discrimination covered by the laws and the available remedies.[4] Furthermore, the Ninth Circuit's holding is contrary to *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985). In *Byrd*, this Court reversed the Ninth Circuit and held that state law claims must be arbitrated even if similar federal statutory claims are not arbitrable. *Id.* at 221.

Additionally, this Court's decisions in *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981), and *Perry v. Thomas*, 482 U.S. 483 (1987), implicitly establish that simply because a federal claim is not required to be arbitrated does not mean that a parallel state claim is not arbitrable. In *Barrentine*, this Court held that "Congress intended to give individual employees the right to bring their minimum wage claims under the [Fair Labor Standards Act] in court." 450 U.S. at 745.[5] However, in *Perry*

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[4] For example, the FEHA prohibits discrimination because of age, disability, "medical condition" and "marital status." Cal. Government Code § 12940(a). The FEHA also allows for unlimited recovery of compensatory and punitive damages, unlike Title VII as amended in 1991.

[5] *Barrentine* was subsequently limited by *Gilmer* to its distinct facts involving arbitration under a collective-bargaining agreement. Post-*Gilmer*, courts have enforced individual agreements to arbitrate FLSA claims. See, e.g., *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 320 (9th Cir. 1996).

the Court ordered arbitration of California statutory wage claims even though the Fair Labor Standards Act, like Title VII, contains a provision authorizing the states to enforce parallel laws. See 42 U.S.C. § 2000e-7; 29 U.S.C. § 218(a).

The Ninth Circuit's holding that FEHA claims cannot be compelled into arbitration is also squarely in conflict with California's endorsement of arbitration of FEHA claims. See *24 Hour Fitness, Inc. v. Superior Court*, ___ Cal. App. 4th ___, 98 Daily Journal D.A.R. 10353, 10355 n. 9 (Sept. 30, 1998) (rejecting *Duffield* and holding that statutory discrimination claims under the FEHA are arbitrable); *Cione v. Foresters Equity Services, Inc.*, 58 Cal. App. 4th 625, 644, 68 Cal. Rptr. 2d 167 (1997); *Brookwood v. Bank of America*, 45 Cal. App. 4th 1667, 1674-75, 53 Cal. Rptr. 2d 515 (1996); *Spellman v. Securities, Annuities & Ins. Services, Inc.*, 8 Cal. App. 4th 452, 460-463, 10 Cal. Rptr. 2d 427 (1992). *Duffield* also ignores the strong California policy favoring arbitration embodied in the California Arbitration Act, Cal. Code of Civil Procedure § 1281 ("A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract."). The Ninth Circuit's determination that FEHA claims have special immunity from the requirements of the California Arbitration Act is thus a serious infringement on a well-established California policy favoring arbitration of such claims.

Duffield creates a federal law basis for avoiding arbitration of FEHA claims that is not recognized by the California courts. As a result, parties who seek to avoid their agreement to arbitrate FEHA claims likely will file their cases in federal court in order to take advantage of

Duffield, and avoid an order to arbitrate under California law. The Ninth Circuit's implicit invitation to file state law employment discrimination claims in federal courts to avoid an agreed-upon obligation to arbitrate such claims will result in additional burdens on federal courts which already face overcrowded dockets and attendant litigation delays. Thus, not only will the "simplicity, informality and expedition of arbitration" be lost, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985), but the delays and accompanying costs of litigation will increase.

III. CONCLUSION

The Ninth Circuit's decision creates an unwarranted impediment to a uniform federal and state policy favoring an efficient, inexpensive and workable alternative to the overcrowded dockets, burdensome litigation costs, and arbitrary jury verdicts experienced by civil litigants. For the foregoing reasons, the Court should grant the petition for writ of certiorari in order to provide necessary guidance to the courts, employers and employees in this significant area of employment law.

October 5, 1998

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IN THE
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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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28 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS CURIAE* 1

STATEMENT OF THE CASE 2

SUMMARY OF REASONS FOR GRANTING THE WRIT 3

REASONS FOR GRANTING THE WRIT 5

I. THE NINTH CIRCUIT'S DECISION, THAT THE 1991 AMENDMENTS TO TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 PRECLUDE MANDATORY ARBITRATION OF TITLE VII DISPUTES, IS A CRITICAL BREAK WITH THE MANY FEDERAL CIRCUITS THAT HAVE APPLIED THIS COURT'S *GILMER v. INTERSTATE/JOHNSON LANE CORP.* RULING TO AUTHORIZE ARBITRATION FOR RESOLVING CIVIL RIGHTS DISPUTES 5

A. The Ninth Circuit's Decision Is in Conflict With This Court's Approach to Arbitration in *Gilmer*—The Foundation of Lower Courts' Decisions Involving Statutory Civil Rights Claims Since 1991 5

1. The Ninth Circuit Diverged Considerably From the Inquiry Required by This Court's Arbitration Cases 5

2. The Ninth Circuit Failed to Address Critical Indicators of Congressional Intent Under This Court's *Gilmer* Framework 8

B. The Ninth Circuit's Decision Has Created Significant Differences of Decisional Law Among the Circuits on an Important Federal Question 10

TABLE OF CONTENTS—Continued

Page

II. THE NINTH CIRCUIT'S DECISION HAS UNDERMINED *GILMER*-STYLE MANDATORY ARBITRATION FOR ALL EMPLOYMENT DISPUTES INSIDE AND OUTSIDE THE NINTH CIRCUIT, BY COMPLICATING NATIONAL EMPLOYERS' ADMINISTRATION OF ALTERNATE DISPUTE RESOLUTION PROGRAMS TO SUCH AN EXTENT THAT THE RULING MAY, *DE FACTO*, END SUCH USEFUL PROGRAMS PREVIOUSLY SANCTIONED BY THIS COURT IN *GILMER* 13

A. The Ninth Circuit's Decision Detracts From the Efficiencies of Uniform Alternative Dispute Resolution Programs 13

B. Clear Guidance From This Court Is Needed to Preserve the Proven Benefits of Arbitration 17

CONCLUSION 20

TABLE OF AUTHORITIES

CASES — Page

Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229 (5th Cir. 1991) 3, 11
Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875 (4th Cir.), *cert. denied*, 117 U.S. 432 (1996) 2, 3, 11, 12
Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981) 19, 20
Bercovitch v. Baldwin School, 133 F.3d 141 (1st Cir. 1998) 10
Cole v. Burns International Security Servs., 105 F.3d 1465 (D.C. Cir. 1997) 3, 9, 11
Duffield v. Robertson Stephens & Co., 144 F.3d 1182 (9th Cir. 1998) ..... *passim*
Faragher v. Boca Raton, 118 S. Ct. 2275 (1998) 9, 17
Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) ..... *passim*
Gilmer v. Interstate/Johnson Lane Corp., 895 F.2d 198 (4th Cir. 1990), *aff'd*, 500 U.S. 20 (1991) 7, 9
Golenia v. Bob Baker Toyota, 915 F. Supp. 201 (S.D. Cal. 1996) 10
Great Western Mortgage Corp. v. Peacock, 110 F.3d 222 (3d Cir.), *cert. denied*, 118 S. Ct. 299 (1997) 2
Hirras v. National R.R. Passenger Corp., 10 F.3d 1142 (5th Cir.), *vacated and remanded on other grounds*, 512 U.S. 1231 (1994) 3, 12
Kuehner v. Dickinson & Co., 84 F.3d 316 (9th Cir. 1996) 6, 14
Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932 (9th Cir. 1992) 4, 6, 11
Miller v. Public Storage Management, 121 F.3d 215 (5th Cir. 1997) 11
Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985) 6
Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983) 20
Patterson v. Tenet Healthcare, 113 F.3d 832 (8th Cir. 1997) 3, 11

TABLE OF AUTHORITIES—Continued

	Page
Prudential Insurance Co. v. Lai, 42 F.3d 1299 (9th Cir. 1994), *cert. denied*, 516 U.S. 812 (1995)	5
Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989)	6
Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, 995 F. Supp. 190 (D. Mass. 1998), *appeal pending*, No. 98-1246 (1st Cir.)	10
Securities Industry Association v. Connolly, 883 F.2d 1114 (1st Cir. 1989), *cert. denied*, 495 U.S. 956 (1990)	4, 18
Seus v. John Nuveen & Co., Inc., 146 F.3d 175 (3rd Cir. 1998)	4, 11, 12
Shearson/American Express Inc. v. McMahon, 482 U.S. 220 (1987)	6
Thompson v. Thompson, 484 U.S. 174 (1988)	12
Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305 (6th Cir. 1991)	3, 11, 12
DOCKETED CASES	
Wright v. Universal Maritime Services Corp., No. 97-889 (U.S.)	2
STATUTES	
Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*	2, 5
Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*	2
Federal Arbitration Act (FAA) 9 U.S.C. § 1 *et seq.*	4, 5
9 U.S.C. § 2	5
9 U.S.C. § 3	15
9 U.S.C. § 4	15
Section 118 of the Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 107, 1081, codified at 42 U.S.C. § 1981 note	8, 10
Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*	2

TABLE OF AUTHORITIES—Continued

UNENACTED LEGISLATION	Page
Civil Rights Procedure Protection Act of 1997, H.R. 983 & S. 63, 105th Cong.	9
Civil Rights Procedures Protection Act of 1996, H.R. 3748, 104th Cong.	9
Civil Rights Procedures Protection Act of 1995, S. 366, 104th Cong.	9
Civil Rights Procedures Protection Act of 1994, H.R. 4981 & S. 2405, 103d Cong.	9
MISCELLANEOUS	
William L. Bedman, *Alternative Dispute Resolution: The Brown & Root Experience, in* The Face of Conflict in the Workplace: The Future of Employment ADR (American Arbitration Association National Employment Conclave, Sept. 22, 1995)	20
Commission on the Future of Worker-Management Relations, Report and Recommendations of the Commission on the Future of Worker-Management Relations Report (1994)	17
EEOC, Notice No. 915.002, Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment (1997)	15
EEOC, *EEOC Pending Inventory Drops Below 58,000 in Third Quarter F/Y 1998* (last modified Aug. 12, 1998) <http://www.eeoc.gov/press/8-1298.html>	18
Federal Courts Study Committee, Report of the Federal Courts Study Committee (1990)	18
Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. Rev. 1344 (1997)	16
Judge Approves Smith Barney Agreement After Changes Made to Satisfy Concerns, Daily Lab. Rep. (BNA), Jul. 28, 1998, at A-13	16

TABLE OF AUTHORITIES—Continued

Page

Martin J. Oppenheimer & Cameron Johnston, *A Management Perspective: Mandatory Arbitration Agreements Are an Effective Alternative to Employment Litigation*, Dispute Resolution J., Fall 1997, at 19 ..... 15, 18

Statistics Division, Administrative Office of U.S. Courts 18, 19

U.S. General Accounting Office, Rep. No. GAO/GGD-97-157, Alternative Dispute Resolution: Employers' Experiences With ADR in the Workplace (1997) 18, 19

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council (EEAC) respectfully submits this brief *amicus curiae*.[1] Letters of consent from all parties have been filed with the Clerk of this Court. The brief supports the petition for a writ of certiorari.

INTEREST OF THE *AMICUS CURIAE*

EEAC is an association of employers formed in 1976 to promote sound programs to end employment discrimination. Its members include more than 300 of the nation's largest private employers. Its directors and officers include many of industry's leading experts on equal employment opportunity (EEO) and affirmative action, whose combined experience gives EEAC valuable insight into the practical and legal aspects of EEO policies and practices.

[1] Counsel for the *amicus curiae* authored the brief in its entirety. No person or entity other than the *amicus* or its counsel made a monetary contribution to the preparation or submission of the brief.

EEAC's members are employers subject to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, and other EEO laws. Many EEAC member companies have contracts with their employees governing some or all terms and conditions of employment. Many such contracts contain provisions requiring arbitration of employment-related claims and disputes.

EEAC's members have an ongoing interest in preserving the enforceability of agreements calling for arbitration of employment-related disputes. Arbitration provides a fair, efficient, and effective means of resolving discrimination claims and other employment-related issues that otherwise would clog the courts. Because of its interest in this subject, EEAC has filed *amicus curiae* briefs in numerous cases supporting the enforceability of arbitration agreements, as well as many other important issues of employment law.[2]

STATEMENT OF THE CASE

In 1988, Tonyja Duffield began working for Robertson Stephens & Co., a securities brokerage firm. As a securities trader, Duffield was required as a condition of her employment (and to comply with federal laws) to sign registration documents that included an agreement to arbitrate "any dispute" with her employer (including disputes arising out of employment or termination of employment). In 1995, Duffield filed suit against Robertson Stephens in federal court, claiming sex discrimination and sexual harassment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (Title VII).

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[2] *E.g. Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Wright v. Universal Maritime Service Corp.*, No. 97-889 (U.S.) (decision pending); *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir.), *cert. denied*, 117 U.S. 432 (1996); *Great Western Mortg. Corp. v. Peacock*, 110 F.3d 222 (3d Cir.), *cert. denied*, 118 S. Ct. 299 (1997); and *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998).

The district court rejected Duffield's arguments that her arbitration agreement was not enforceable as to her Title VII and state law claims, but certified the issues raised for immediate appeal to the Ninth Circuit. The Ninth Circuit ruled that, under the Civil Rights Act of 1991, employers may not compel individuals as a condition of employement to waive the right to a judicial forum to resolve Title VII claims. Robertson Stephens has petitioned this Court for a writ of certiorari.

SUMMARY OF REASONS FOR GRANTING THE WRIT

Whether an individual may be compelled, as a condition of employment, to submit statutory civil rights claims to arbitration is a frequently litigated question. Even as opponents of such arrangements renew challenges to what ought by now to be a settled area of law, courts have been rejecting categorical attacks on arbitration more surely and swiftly—until *Duffield*. In a single, sweeping decision with significant ramifications inside and out of the securities industry, the Ninth Circuit set arbitration law back seven years.

This Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), created a rebuttable presumption that "statutory claims may be the subject of an arbitration agreement . . . 'unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.'" *Id.* at 26 (citation omitted). Although *Gilmer* involved a claim under the Age Discrimination in Employment Act (ADEA), several courts of appeals correctly have viewed *Gilmer* as expressing this Court's endorsement of arbitration for all statutory civil rights claims, including those arising under Title VII.[3]

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[3] *See, e.g., Patterson v. Tenet Healthcare*, 113 F.3d 832 (8th Cir. 1997); *Cole v. Burns Int'l Security Servs.*, 105 F.3d 1465 (D.C. Cir. 1997); *Austin v. Owens-Brockway Glass Container*, 78 F.3d 875 (4th Cir. 1996), *Hirras v. National R.R. Passenger Corp.*, 10 F.3d 1142 (5th Cir.), *vacated and remanded on other grounds*, 512 U.S. 1231 (1994); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305 (6th Cir. 1991); *Alford v. Dean Witter Reynolds, Inc.*,

The Ninth Circuit's decision below was the first federal appeals' court decision to hold, as a matter of law, that claims arising under Title VII cannot be subjected to "compulsory" arbitration. Though arguably *Duffield* already conflicted with the many circuit court opinions enforcing agreements to arbitrate Title VII disputes, a month after the Ninth Circuit's decision the Third Circuit squarely rejected *Duffield* and its rationale. *See Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175 (3d Cir. 1998). *Seus* thus underscores the existence of a direct conflict among the circuits on the arbitrability of Title VII claims under a mandatory, pre-dispute agreement.

Moreover, the Ninth Circuit's decision threatens the continued use of the valuable tool of mandatory arbitration as a means of resolving employment disputes. As the number and cost of employment-related lawsuits has increased, employers nationwide have sought viable, legitimate ways to identify workplace problems early, and resolve them without lengthy, acrimonious litigation. Arbitration, often the final step in a multi-stage process, has met with growing acceptance as an efficient, cost-effective method that is fair to all concerned.

Under *Duffield*, however, the enforceability of an arbitration agreement now will depend on whether a dispute arises under Title VII, and whether the dispute arises inside or outside of the Ninth Circuit. Faced with such a conflicting and complicated system, some employers may abandon arbitration altogether. The "liberal federal policy favoring arbitration" embodied in the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, would not be served by such a result. *Gilmer*, 500 U.S. at 25. Indeed, Congress and the courts have long recognized that arbitration can "serve as therapy for the ailment of the crowded docket." *Securities Indus. Ass'n v. Connolly*, 883 F.2d 1114, 1116 (1st Cir. 1989), *cert. denied*, 495 U.S. 956 (1990). Given the judiciary's overwhelming caseload, such "therapy" has never been more appropriate and necessary.

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939 F.2d 229 (5th Cir. 1991) (on remand, following *Gilmer*); *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932, 935 (9th Cir. 1992).

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S HOLDING, THAT THE 1991 AMENDMENTS TO TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 PRECLUDE MANDATORY ARBITRATION OF TITLE VII DISPUTES, IS A CRITICAL BREAK WITH THE MANY FEDERAL CIRCUITS THAT HAVE APPLIED THIS COURT'S *GILMER v. INTERSTATE/JOHNSON LANE CORP.* RULING TO AUTHORIZE ARBITRATION FOR RESOLVING CIVIL RIGHTS DISPUTES

A. The Ninth Circuit's Holding Is in Conflict With This Court's Approach to Arbitration in *Gilmer*—The Foundation of Lower Courts' Decisions Involving Statutory Civil Rights Claims Since 1991

1. *The Ninth Circuit Diverged Considerably From the Inquiry Required by This Court's Arbitration Cases*

The Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, provides that a written contract "to settle by arbitration a controversy thereafter arising . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.* at § 2. This Court declared in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), that a claim under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, "can be subjected to compulsory arbitration pursuant to an arbitration agreement," 500 U.S. at 23, and that the provisions of the FAA "manifest a 'liberal federal policy favoring arbitration agreements.'" *Id.* at 25 (citation omitted).

"'Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.'" *Gilmer*, 500 U.S. at 26 (*quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985).[4] In making the determination

[4] Even the Ninth Circuit itself followed *Gilmer* in Title VII cases prior to *Duffield*. *See Prudential Ins. Co. v. Lai*, 42 F.3d 1299, 1303

whether Congress has evinced an intent to preclude a waiver of a judicial forum, this Court has said that:

> the burden is on [the party challenging the agreement] to show that Congress intended to *preclude* a waiver of a judicial forum. . . . If such an intention exists, it will be discoverable in the text of the [statute], its legislative history, or an "inherent conflict" between arbitration and the [statute's] underlying purposes. *Throughout such an inquiry*, it should be kept in mind that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration."

Gilmer, 500 U.S. at 26 (citations omitted) (emphasis added).

While the "intent to preclude" inquiry is tailored to the text and history of the specific statute at issue, the "importance" of the statutory right at issue is not dispositive—if even material—to the inquiry under the FAA. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (federal age discrimination claim); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); and *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 319 (9th Cir. 1996) (noting that "the Supreme Court has seldom found congressional intent to preclude such a waiver, and has enforced contracts to arbitrate claims under the Sher-

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(9th Cir. 1994) ("Our circuit has extended Gilmer to employment discrimination claims brought under Title VII."), *cert. denied*, 516 U.S. 812 (1995), and *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932, 935 (9th Cir. 1992) (holding that "[a]lthough Gilmer involved a claim under the . . . ADEA, rather than the Title VII claim brought by Mago, both statutes are similar in their aims and substantive provisions. Therefore, we conclude that Mago has not met her burden of showing that Congress, in enacting Title VII, intended to preclude arbitration of claims under the Act.") (internal citations omitted). Both of these cases were decided after enactment of the 1991 Civil Rights Act.

man Act, the Racketeer Influenced and Corrupt Organizations Act, and the Securities Exchange Act of 1934.").

The question a court must answer is not whether Congress thought the protected rights (in this case Title VII rights) were *important*, but whether Congress expressed a belief that the protected rights were so unique that arbitration could not be relied upon as a means of resolving statutory claims, and thus exempted such claims from the reach of the FAA. As the Fourth Circuit observed in its own discussion in *Gilmer*:

> Courts cannot determine whether arbitration agreements are to be enforced by making subjective judgments as to the relative importance of various federal statutes. Rather, Congress must provide clear guidance if it wishes federal courts to refrain from enforcing arbitration agreements when violations of a particular statutory right are alleged.

Gilmer v. Interstate/Johnson Lane Corp., 895 F.2d 198, 203 (4th Cir. 1990), *aff'd*, 500 U.S. 20 (1991).

Despite clear direction from this Court to evaluate arbitrability in light of a strong federal policy favoring arbitration, the Ninth Circuit ruled that a claim under Title VII cannot be subjected to "compulsory" arbitration.[5] In so doing, the Ninth Circuit diverged from accepted judicial interpretation of the FAA, vis-a-vis statutory rights, when it declared—without reference to any authority—that "in examining congressional legislation, it is now incumbent upon courts to consider whether Congress intended to preclude every form of arbitration of claims arising under a particular statute, or whether it intended to preclude only certain forms of arbitration agreements"—*e.g.*, compulsory arbitration agreements. *Duffield*, 144 F.3d at 1189.

The Ninth Circuit's distinction between acceptable Title VII arbitration and unacceptable (*i.e.*, "compulsory")

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[5] The Ninth Circuit used the term "compulsory arbitration" to refer to pre-dispute arbitration agreements required by employers as a condition of employment. *Duffield*, 144 F.3d at 1187.

Title VII arbitration is a variation on the line of argument this Court rejected in *Gilmer*, namely, that an arbitration agreement that is the product of unequal bargaining power is unenforceable. The Ninth Circuit apparently viewed "compulsory" arbitration as the result of unequal bargaining power. But this Court already has declared that "[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context." *Gilmer*, 500 U.S. at 33.

2. *The Ninth Circuit Failed to Address Critical Indicators of Congressional Intent Under This Court's* Gilmer *Framework*

The *Duffield* court's approach to determining whether a statutory Title VII claim can be arbitrated pursuant to the FAA incompletely applied the framework established by this Court in *Gilmer*. The text of the 1991 Civil Rights Act encourages arbitration and was adopted at a time when civil rights actions clearly were arbitrable according to this Court. Section 118 of the Civil Rights Act of 1991 states, in relevant part:

> Where *appropriate* and *to the extent authorized by law*, the use of alternative means of dispute resolution, including . . . arbitration, is *encouraged* to resolve disputes arising under the Acts or provision of Federal law amended by this title.

Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081 (codified at 42 U.S.C. § 1981 note (emphasis added)).

Rather than concluding, as has every other circuit,[6] that Section 118 obviates any further inquiry into Congress' intent with respect to the arbitrability of Title VII disputes, the Ninth Circuit declared the statutory language "ambiguous" and turned to the 1991 Act's legislative history for evidence of a congressional intent to preclude a waiver of a judicial forum. The Ninth Circuit's decision

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[6] The rulings of other courts on the text of Section 118 of the Civil Rights Act of 1991 are discussed *infra* in Section I.B.

to shun the statutory text of Section 118 that already has been construed by several sister circuits is highly questionable. *Cf. Cole*, 105 F.3d at 1472 ("In a case such as this, where the statutory text does not admit of serious ambiguity, and where firmly established case law is absolutely clear on the meaning of the statute, legislative history is, at best, secondary, and, at worst, irrelevant") (*citing Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 808-09 n.3 (1989)).

Congress passed and President Bush signed the 1991 Civil Rights Act after this Court handed down its decision in *Gilmer*. As such, the Act must be read as adopting *Gilmer's* endorsement of arbitration for resolving statutory civil rights claims. *See Faragher v. Boca Raton*, 118 S. Ct. 2275, 2286 (1998) (the "presumption that Congress was aware of [prior] judicial interpretations and, in effect, adopted them" enhances the precedential effect of this Court's opinions not modified by the 1991 Civil Rights Act) (citation omitted).

Moreover, even if the Ninth Circuit were justified in resorting to legislative history for indicators of Congressional intent, Congress' actions subsequent to the 1991 Act foreclose whatever inference the Ninth Circuit gleaned from statements surrounding the Act's passage suggesting that mandatory arbitration of Title VII claims was prohibited by the Act. "[C]ourts should not strain to find in statutes what Congress has not put there." *Gilmer*, 895 F.2d at 202. Opponents of mandatory arbitration repeatedly have introduced in Congress unsuccessful proposals that would prohibit mandatory arbitration of statutory claims as a condition of employment. Such "anti-*Gilmer*" bills, introduced in 1997, 1996, 1995 and 1994, establish that Congress has not prohibited mandatory arbitration of statutory claims. *See, e.g.*, Civil Rights Procedures Protection Act of 1997, H.R. 983 & S. 63, 105th Cong.[7]

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[7] *See also* Civil Rights Procedures Protection Act of 1996, H.R. 3748, 104th Cong.; Civil Rights Procedures Protection Act of 1995, S. 366, 104th Cong.; Civil Rights Procedures Protection Act of 1994, H.R. 4981 & S. 2405, 103d Cong.

The Ninth Circuit neglected to address the significance of these failed legislative proposals. *See, e.g., Golenia v. Bob Baker Toyota*, 915 F. Supp. 201, 205 (S.D. Cal. 1996) (noting that bills pending in Congress to amend civil rights statutes [including Title VII] that would make mandatory, pre-dispute arbitration agreements illegal "would be meaningless" if such agreements already were banned by the 1991 Civil Rights Act). A conclusive ruling is needed from this Court to make clear that Congressional intent to preclude mandatory arbitration of civil rights claims cannot be inferred from the text or conflicting legislative accounts of the 1991 Civil Rights Act, particularly where explicit proposals to reverse the current presumption of enforceability have gone unenacted.

B. The Ninth Circuit's Decision Has Created Significant Differences of Decisional Law Among the Circuits on an Important Federal Question

As this Court has directed, in the absence of a *clear* indication of congressional intent to preclude arbitration of a particular statutory dispute, the Federal Arbitration Act commands that parties abide by their agreements to arbitrate even statutory claims. *See Gilmer*, 500 U.S. at 26. Taking the command of this Court and the FAA seriously, most lower courts have enforced agreements to arbitrate employment related controversies involving Title VII claims.[8]

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[8] One district court has taken the same flawed path as the Ninth Circuit in *Duffield*. *See Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith*, 995 F. Supp. 190 (D. Mass. 1998) (refusing to order arbitration of Title VII claims, based on the court's reading of the legislative history of the 1991 Civil Rights Act), *appeal pending*, No. 98-1246 (1st Cir. 1998). The *Rosenberg* case presently is on appeal to the First Circuit. The First Circuit already has ruled that the language in the Americans with Disabilities Act, which is identical to the language used in Section 118 of the 1991 Civil Rights Act, is sufficient evidence that Congress did *not* intend to preclude mandatory arbitration of a statutory dispute. *See Bercovitch v. Baldwin Sch.*, 133 F.3d 141, 148-50 (1st Cir. 1998) ("[t]he meaning of this language, far from evidencing an intention to preclude arbitration, can only be interpreted as favoring it," referring

For example, the following circuit courts have viewed agreements to arbitrate Title VII claims as a natural extension of *Gilmer*, finding no material distinction between ADEA claims and Title VII claims. *See Cole v. Burns Int'l Security Servs.*, 105 F.3d 1465, 1467-68, (D.C. Cir. 1997) ("in this [Title VII] case, we are constrained by *Gilmer* to find the arbitration agreement enforceable."); *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932, 935 (9th Cir. 1992) (pre-*Duffield*) ("[a]lthough Gilmer involved a claim under the . . . ADEA, rather than the Title VII claim brought by Mago, both statutes are similar in their aims and substantive provisions.") (internal citations omitted); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 307 (6th Cir. 1991) (Title VII claim), *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229 (5th Cir. 1991) (on remand, following *Gilmer*, Title VII claim).

Additionally, several circuit courts have read the statutory text of Section 118 of the 1991 Civil Rights Act as an *explicit* basis for concluding that Congress did *not* intend to preclude a waiver of judicial resolution of Title VII claims.[9] *See Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175, 182 (3d Cir. 1998) ("On its face, the text of § 118 evinces a clear Congressional intent to encourage arbitration of Title VII and ADEA claims, not to preclude such arbitration."); *Patterson v. Tenet Healthcare*, 113 F.3d 832, 837 (8th Cir. 1997) ("Moreover, the arbitrability of Title VII claims finds support in [§ 118 of] the Civil Rights Act of 1991"); *Austin v. Owens-*

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to 42 U.S.C. 12212). *See also Miller v. Public Storage Mgmt.*, 121 F.3d 215, 218 (5th Cir. 1997) ("The explicit language of the ADA advocates the use of alternative resolution . . . . [and] persuasively demonstrates Congress did not intend to exclude the ADA from the scope of the FAA.").

[9] The burden is on the *opponent* of arbitration to establish that Congress intended to *preclude* arbitration of the claim at issue. *Gilmer*, 500 U.S. at 26. The party seeking to enforce arbitration need not establish that arbitration explicitly is authorized by the statute, because the FAA establishes a presumption of arbitrability. *Id.*

Brockway Glass Container, 78 F.3d 875, 881 (4th Cir.) ("The language of the [Civil Rights Act of 1991] could not be any more clear in showing Congressional favor towards arbitration."), *cert. denied*, 117 S. Ct. 432 (1996); *Hirras v. National R.R. Passenger Corp.*, 10 F.3d 1142, 1146 (5th Cir.) ("there exist no federal or congressional policies prohibiting submission of [Title VII] claims to arbitration. Indeed [Section] 118 of the 1991 Civil Rights Act encourages the use of . . . arbitration."), *vacated and remanded on other grounds*, 512 U.S. 1231 (1994).

The Ninth Circuit's decision below is the first by a federal circuit court to exclude Title VII disputes categorically from mandatory arbitration under an otherwise FAA-enforceable arbitration agreement. Within a month of the Ninth Circuit's ruling, the Third Circuit confirmed expressly that the Ninth Circuit decision creates a significant difference of decisional law on an important federal question. In *Seus*, the Third Circuit ruled that neither Title VII, nor the amendments to Title VII in the 1991 Civil Rights Act, precluded mandatory arbitration agreements covering Title VII claims, even when such agreements are made as a condition of employment. *Seus*, 146 F.3d at 182-3. On the contrary, the Third Circuit determined that Section 118 of the 1991 Civil Rights Act reveals a clear Congressional intent to *encourage* arbitration of such claims. *Id.* at 182. The Third Circuit likewise rejected *Duffield*'s reading of the legislative history of the 1991 Civil Rights Act, stating that "no amount of commentary from individual legislators or committees would justify a court in reaching the result the EEOC would have us reach." *Id.*[10]

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[10] The reasoning of Justice Scalia, concurring, in *Thompson v. Thompson*, 484 U.S. 174, 188, 191-192 (1988), should apply: "Committee reports, floor speeches, and even colloquies between Congressmen, . . . are frail substitutes for bicameral vote upon the text of a law and its presentment to the President.'" *See also Owens-Brockway*, 78 F.3d at 882 ("[e]ven if the provisions of the legislative history are contrary to the statute, the statute must prevail.").

As the foregoing discussion illustrates, the Ninth Circuit has departed significantly from this Court's *Gilmer* analysis, and from the consistent rulings of the other federal circuits on the significance of the 1991 Civil Rights Act's impact on the arbitrability of Title VII claims. In so doing, the Ninth Circuit now has obscured what had been a clear and consistent development at the circuit court level of case law harmonizing the Federal Arbitration Act with the resolution of statutory disputes. As discussed in the next section, the *Duffield* ruling, if left to stand, will threaten the effective use of arbitration as an alternative dispute resolution mechanism nationwide.

II. THE NINTH CIRCUIT'S DECISION HAS UNDERMINED *GILMER*-STYLE MANDATORY ARBITRATION FOR ALL EMPLOYMENT DISPUTES INSIDE AND OUTSIDE THE NINTH CIRCUIT, BY COMPLICATING NATIONAL EMPLOYERS' ADMINISTRATION OF ALTERNATE DISPUTE RESOLUTION PROGRAMS TO SUCH AN EXTENT THAT THE RULING MAY, *DE FACTO*, END SUCH USEFUL PROGRAMS PREVIOUSLY SANCTIONED BY THIS COURT IN *GILMER*.

A. The Ninth Circuit's Decision Detracts From the Efficiencies of Uniform Alternative Dispute Resolution Programs

As the preceding sections illustrate, the Ninth Circuit's reading of the 1991 Civil Rights Act and the FAA now precludes enforcement of mandatory, pre-dispute arbitration agreements to resolve Title VII claims asserted by individuals employed within the nine states covered by the Ninth Circuit. Such agreements currently are legal and enforceable for Title VII claims elsewhere in the country.[11] Furthermore, such agreements currently are

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[11] As noted *supra*, Section I.B., a decision by the District of Massachusetts holding that the 1991 Civil Rights Act amendments preclude arbitration of Title VII disputes is pending on appeal before the First Circuit. The First Circuit, however, has endorsed mandatory arbitration under statutory language in the Americans with Disabilities Act identical to the language in the 1991 Civil

legal and enforceable even within the Ninth Circuit for statutory disputes other than Title VII claims. *See, e.g., Kuehner v. Dickinson & Co.*, 84 F.3d 316 (9th Cir. 1996) (FLSA claim arbitrable). By carving out an unprecedented—and unwarranted—exception from the FAA for Title VII claims, the *Duffield* decision has all but destroyed the certainty and uniformity employers operating within the Ninth Circuit hoped to obtain by entering into agreements with their employees to arbitrate employment-related disputes.

Some employers, including a number of EEAC's members, have adopted alternative dispute resolution programs in the last several years that include mandatory arbitration as the final step in a multi-step internal dispute resolution process. They have done so with growing confidence in the trend among federal courts to enforce arbitration agreements uniformly for all statutory disputes. Employers' confidence in adopting mandatory arbitration as an alternative to litigation was well placed, if, in fact, "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Gilmer*, 500 U.S. at 36, *quoting Mitsubishi*, 473 U.S. at 626-627.

The Ninth Circuit alone has adopted an unworkable subjective test for determining when, if ever, employers can enforce agreements to arbitrate Title VII claims. The *Duffield* court interpreted the language in Section 118 of the 1991 Civil Rights Act that arbitration is encouraged "[w]here appropriate" to mean "where arbitration . . . afford[s employees] . . . an opportunity to present their claims in an alternative forum, . . . that they find *desirable*." *Duffield*, 144 F.3d at 1194. The implication is that only through voluntary, rather than compulsory, arbitration agreements, can employees express this desire.

Rights Act regarding alternative dispute resolution. All other circuits have enforced mandatory agreements to arbitrate Title VII disputes, as discussed *supra*, Section I.B.

The EEOC, *amicus curiae* for *Duffield* in the case below, also has advanced the position that the civil rights statutes the Commission enforces permit only "voluntary" agreements to arbitrate.[12] In fact the EEOC's official position on *Gilmer* is that "[t]he Gilmer decision is not dispositive of whether employment agreements that mandate binding arbitration of discrimination claims are enforceable." EEOC, Notice No. 915.002, Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment 2 n.2 (1997).

The *Duffield* decision, obviously contrary to *Gilmer*, if left to stand, will give the EEOC unwarranted precedent to engage in further litigation against employers that use the very types of arbitration agreements for resolving statutory disputes that were blessed by this Court in *Gilmer*. Moreover,

> If arbitration were voluntary th[e] balance of interests [favoring adoption of an arbitration system] disappears—the more litigious applicants and employees would continue to seek judicial recourse in the hopes of a large jury award while those who might not normally pursue litigation would now likely seek arbitration. Needless to say, this would destroy the employer's incentive for implementing arbitration agreements.

Martin J. Oppenheimer & Cameron Johnstone, *A Management Perspective: Mandatory Arbitration Agreements Are an Effective Alternative to Employment Litigation*, Dispute Resolution J., Fall 1997, at 19, 22.

In addition to contravening *Gilmer*, a subjective or voluntariness standard for determining when to enforce an agreement to arbitrate would destroy the uniformity of ADR programs, making arbitration agreements en-

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[12] Presumably, if only "voluntary" agreements to arbitrate were contemplated by the FAA, there would be no provision in the Act for seeking an order to stay judicial proceedings or compel arbitration, 9 U.S.C. §§ 3, 4—because parties "volunteering" to arbitrate would never disagree over whether they agreed to settle their dispute by arbitration.

forceable for some employees, but not others in a particular workforce. The transactional costs involved in requiring employers to maintain conflicting or competing dispute resolution systems undoubtedly would lead some employers to abandon arbitration altogether. As Professor Samuel Estreicher notes:

> [a] dispute resolution system, like a pension plan, is what economists call a "collective" or "public" good. It is efficiently provided, if at all, on a collective basis. This is because the costs of such a program (an in-house claims processing office, ombudspersons, possible mediators, etc.), even when justified by the collective benefits to the affected employees, typically exceed the benefits to individual employees. Piecemeal application of a dispute resolution program could threaten to unravel the program for all other similarly situated employees.

Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. Rev. 1344, 1359 (1997).

The threat of administering inconsistent dispute resolution programs is not merely academic. A recent news story detailing the highly publicized settlement of a Title VII case against Wall Street giant Salomon Smith Barney reports that

> the chief beneficiaries of the change are class members covered by a decision of the U.S. Court of Appeals for the Ninth Circuit in *Duffield v. Robertson Stephens & Co.*, which rejected the securities industry's system of compulsory arbitration of employment claims.

Judge Approves Smith Barney Agreement After Changes Made to Satisfy Concerns, Daily Lab. Rep. (BNA), Jul. 28, 1998, at A-13, 14. Thus, similarly situated employees of the same company will have different avenues of redress for statutory civil rights claims open to them, simply by virtue of their geographic location.

B. Clear Guidance From This Court Is Needed to Preserve the Proven Benefits of Arbitration

Alternative dispute resolution, "encouraged" by the 1991 Civil Rights Act, including arbitration, benefits both employers and employees, and gives the parties an opportunity to avoid harm in the early stages of conflict. Not surprisingly, by making it easier for employees to raise disputes, arbitration gives management early notice of sensitive issues in the workplace and the opportunity to respond to problems more promptly and effectively.

As this Court observed just three months ago:

> Although Title VII seeks "to make persons whole for injuries suffered on account of unlawful employment discrimination," *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975), its "primary objective," like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm. *Id.*, at 417," . . . It would therefore implement clear statutory policy and complement the Government's Title VII enforcement efforts to recognize the employer's affirmative obligation to prevent violations and give credit here to employers who make reasonable efforts to discharge their duty."

Faragher v. Boca Raton, 118 S. Ct. 2275, 2292 (1998). Employers have adopted internal complaint resolution systems, which include arbitration, to identify and remedy workplace disputes.

Moreover, traditional court processes are not equally accessible, or at least not equally effective, for all employees seeking to resolve discrimination claims. For example, the Commission on the Future of Worker-Management Relations (Dunlop Commission) found disparities in the demographic profile of employees that actually litigate employment disputes, noting such plaintiffs "come from the ranks of managers and professionals rather than lower level professionals." Dunlop Commission, Report and Recommendations of the Commission on the Future of Worker-Management Relations Report 25 (1994). As

one observer comments, "[r]ightly or wrongly, many applicants and employees are extremely concerned about the prospect of being characterized as litigious or anti-employer and are much more likely to bring workplace issues forward in a private setting." Oppenheimer & Johnstone, *supra*, at 23.

"Congress passed the Federal Arbitration Act . . . to help legitimate arbitration and make it more readily useful to disputants. The hope has long been that the Act could serve as therapy for the ailment of the crowded docket." *Securities Indus. Ass'n v. Connolly*, 883 F.2d 1114, 1116 (1st Cir. 1989). Viewing the strong endorsements of arbitration by Congress and this Court against an ominous backdrop of the current, overwhelming federal caseload, such "therapy" is more appropriate and necessary now than ever.

In the private sector, the use of ADR was "spurred in the early 1990s by a dramatic increase in the number of discrimination complaints, along with the costs, time, and frustration involved in attempting to resolve them." U.S. General Accounting Office, Rep. No. GAO/GGD-97-157, Alternative Dispute Resolution: Employers' Experiences With ADR in the Workplace 7 (1997). The EEOC already is unable to keep up with the crush of statutory employment charges it receives, carrying a backlog of nearly 58,000 charges. *See* EEOC, *EEOC Pending Inventory Drops Below 58,000 in Third Quarter F/Y 1998* (last modified Aug. 12, 1988) <http://www.eeoc.gov/press/8-1298.html>. When the EEOC issues right-to-sue letters rather than investigating each claim thoroughly, it passes its caseload to the already over-burdened federal court system.[13] Indeed, in the EEOC's own words, "the

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[13] Courts simply cannot afford to foreclose the alternative of arbitration. Between 1969 and 1990, employment claims filed in federal court increased by over two thousand percent. Federal Courts Study Committee, Report of the Federal Courts Study Committee 61 (1990). Since 1990, the number of such claims has tripled. Source: Statistics Division, Administrative Office of U.S. Courts. To compound matters, increases in the total number of federal judgeships

agency's pending inventory of discrimination charges has been sliced nearly in half down from approximately 110,000 charges in fiscal year (FY) 1997 to 57,871 . . . ." *Id.* Title VII charges represent between 74% (1995) and 77% (1997) of the EEOC's charge inventory. *Id.* In the years that the EEOC was "slicing" its charge inventory in half, the majority of Title VII charges resulted in actions that entitled the charging parties to pursue private court suit.[14]

Arbitration provides an extrajudicial means by which disputes that typically arise in the employment setting can be resolved in a more efficient and less expensive manner, without further burdening our overcrowded court system.

> The reasons favoring arbitration are as wise as they are obvious: litigation is costly and time consuming . . . . By bringing together persons actually involved in the workplace, often assisted by a neutral arbitrator experienced in such matters, disputes are resolved swiftly and cheaply. This mechanism . . . provides a swift, fair, and inexpensive remedy.

Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 747-48 (1981) (Burger, C.J., dissenting).

As Chief Justice Warren Burger recognized some 17 years ago, "people's patience with the judicial system is wearing thin." *Id.* at 752. The process of administrative investigation by the EEOC and litigation may take years to complete. "By the time of trial, the perceptions of

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have not kept pace with court filings. In 1974, the number of cases filed per district court judgeship was 358. By 1997, that figure had risen to 480. *Id.*

[14] For example, 38,731 (or 62%) of 62,533 Title VII charges resolved in 1997 resulted in a "no reasonable cause" determination that allowed the charging party to sue. That year, only 6,397 (or 10.2% of) Title VII charges brought to the EEOC were resolved in some way. These numbers are striking when compared to the outcome of employers' ADR systems. For example, at one company, between 80 and 90 percent of employment disputes are resolved within two months or less of entering the employer's ADR system. *See ADR* in the Workplace, GAO/CCD-97-157, at 40.

the parties and witnesses have been irreversibly colored and polarized by years of conflict. . . . Emotional and economic damages that did not exist at the time of the dispute have accumulated, compounded, and assumed an importance far out of proportion to the nature of the dispute." William L. Bedman, *Alternative Dispute Resolution: The Brown & Root Experience, in* The Face of Conflict in the Workplace: The Future of Employment ADR (American Arbitration Association National Employment Conclave, Sept. 22, 1995).

Thus, as Chief Justice Burger put it, a holding that limits enforceability of a voluntary agreement to arbitrate statutory claims "runs counter to every study and every exhortation of the Judiciary, the Executive, and the Congress urging the establishment of reasonable mechanisms to keep matters of this kind out of the courts." *Barrentine*, 450 U.S. at 752.

The Ninth Circuit's decision threatens both employers' administration of alternative dispute resolution programs, and the otherwise uniform body of law that had developed among the circuit courts with respect to the enforceability of mandatory agreements to arbitrate statutory civil rights claims, including Title VII disputes. This critical departure opens new avenues of attack by opponents of arbitration, undermining the relative speed of arbitration over traditional court suits, and inviting new litigation over an indivdual's state of mind under the Ninth Circuit's subjective "desirability" standard for arbitrating Title VII disputes. The strong national policy favoring arbitration would not be served by such a result. "Congress' clear intent, in the Arbitration Act, [is] to move the parties to an arbitrable dispute out of court and into arbitration as quickly as possible." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983).

CONCLUSION

For the reasons discussed above, the *amicus curiae* Equal Employment Advisory Council respectfully requests that the Court grant certiorari in this case.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ROBERTSON, STEPHENS & COMPANY,

Petitioner,

—v.—

TONYJA DUFFIELD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF ON BEHALF OF THE SECURITIES INDUSTRY ASSOCIATION AS AN *AMICUS CURIAE* IN SUPPORT OF PETITION

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MOTION FOR LEAVE TO FILE

The Securities Industry Association ("SIA") moves this Court to allow filing of this *amicus curiae* brief.

The SIA files this *amicus curiae* brief with the consent of the parties. Due to an oversight, the SIA is filing this brief two days beyond the deadline for filing of *amicus curiae* briefs in support of the petition for a writ of *certiorari*. The SIA, therefore, respectfully requests that this Court grant this motion for leave to file out of time.

October 6, 1998

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

I. STATEMENT OF INTEREST 1

II. SUMMARY OF ARGUMENT 3

III. ARGUMENT 5

I. BECAUSE THE NINTH CIRCUIT'S DECISION CONFLICTS WITH *GILMER*, FURTHER GUIDANCE FROM THIS COURT IS NEEDED. 5

A. *Gilmer* Unequivocally Enforced Agreements to Arbitrate Statutory Discrimination Claims. 5

B. The Ninth Circuit's Strained Construction of the 1991 Civil Rights Act Conflicts with *Gilmer*. 7

II. THE SPLIT IN THE CIRCUITS IS UNTENABLE FOR EMPLOYERS AND EMPLOYEES RESOLVING DISPUTES. 10

A. The Ninth Circuit's Duffield Decision Conflicts with Every Other Circuit That Has Considered the Issue. 10

B. Because a Conflict in the Circuits Results in Inconsistent Employment Policies and Hampers the Quick and Efficient Resolution of Employment Disputes, a Writ of *Certiorari* Should Issue. 13

IV. CONCLUSION 19

TABLE OF AUTHORITIES

PAGE

Cases:

Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875 (4th Cir.), *cert. denied*, ___ U.S. ___, 117 S.Ct. 432 (1996) 12

Cole v. Burns Inter. Sec. Svces., 105 F.3d 1465, 1472-73 (D.C. Cir. 1997) 11

Duffield v. Robertson Stephens & Co., 144 F.3d 1182 (1997) 3, 6, 8, 9 18

Faragher v. City of Boca Raton, ___ U.S. ___, 118 S.Ct. 2275, 1998 WL 336322 (June 26, 1998) 9

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) 3, 5, 6, 7

Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932 (9th Cir. 1992) 10

Matthews v. Rollins Hudig Hall Co., 72 F.3d 50 (7th Cir. 1995) 11

Mouton v. Metropolitan Life Ins. Co., ___ F.3d ___, 1998 WL 396827 (5th Cir. July 31, 1998) 4, 12, 13

Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979) 10

Patterson v. Tenet Healthcare, Inc., 113 F.3d 832 (8th Cir. 1997) 11

TABLE OF AUTHORITIES

PAGE

Seus v. John Nuveen & Co., 146 F.3d 175 (3d Cir. 1998) 4, 12

Statutes:

1991 Civil Rights Act, Pub. L. 102-166 .....7, 8

42 U.S.C. § 1981 8

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TABLE OF AUTHORITIES

PAGE

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I. STATEMENT OF INTEREST[1]

The SIA brings together the shared interests of more than 800 securities firms throughout North America. SIA members – including investment banks, broker-dealers, specialists, and mutual fund companies – are active in all markets and in all phases of corporate and public finance. SIA member firms employ 380,000 individuals in the United States and account for $270 billion of revenues in our nation's economy. They manage the accounts of more than 50 million investors directly and tens of millions of investors indirectly through corporate thrift and pension plans.

Many SIA member firms utilize arbitration to resolve a broad range of disputes. Some firms require employees, as a condition of their employment, to register with a self-regulatory organization whose rules require

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[1] This *amicus curiae* brief in support of the petition for writ of *certiorari* was funded solely by the SIA and authored entirely by counsel for the SIA.

arbitration of some or all employment claims.[2] Other SIA member firms enter into private, pre-dispute arbitration agreements with employees, whereby those employees agree to arbitrate such disputes.

In the securities industry, employment claims are almost always intertwined with performance issues that may have regulatory significance. For these reasons, arbitration of statutory employment claims is an important part of how SIA's members conduct business.

The SIA is familiar with the questions involved in this case and believes that it would be helpful to the Court to file this *amicus curiae* brief in order to assist the Court in the resolution of this case.

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[2] Two of the largest self-regulatory organizations, the New York Stock Exchange, Inc. and the National Association of Securities Dealers, have recently proposed changing their rules to no longer require registered employees to arbitrate statutory employment discrimination claims. *See* Peter Truell, *Big Board Votes to Abandon Mandatory Job-Bias Arbitration*, N.Y. Times, September 4, 1998, at C8; *SEC Opens Courtroom Door to Bias Suits; NASD Proposal to End Arbitration Rule OK'd*, Chicago Trib., June 24, 1998, at B2.

II. SUMMARY OF ARGUMENT

The SIA respectfully submits that a writ of *certiorari* should issue to review the judgment of the United States Court of Appeals for the Ninth Circuit below, reported at *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (1997), that rejects this Court's holding in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), and directly conflicts with the decisions of each of the other circuit courts of appeals that has addressed this issue.

By holding that all arbitration agreements entered into as a condition of employment are unenforceable with respect to statutory discrimination claims arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and state anti-discrimination statutes, the Ninth Circuit effectively rejected *Gilmer*, wherein this Court upheld such agreements on facts similar to the instant case. Further guidance on *Gilmer* is necessary to prevent its erosion.

The Ninth Circuit's sweeping decision to preclude all such arbitration agreements – including private arbitration agreements and agreements entered into by employers in virtually every sector of our nation's economy – is in direct conflict with decisions by every other circuit court that has considered the issue, including recent decisions by the Third Circuit, *Seus v. John Nuveen & Co.*, 146 F.3d 175 (3d Cir. 1998), and the Fifth Circuit, *Mouton v. Metropolitan Life Ins. Co.*, ___ F.3d ___, 1998 WL 396827 (5th Cir. July 31, 1998). This conflict between the circuits severely hampers employers from achieving any final resolution of employment disputes – especially those employers in the Ninth Circuit and employers with multi-state operations.

Because most SIA member firms employ individuals who have agreed to arbitrate all employment disputes, including statutory employment disputes, and because a large number of those firms operate in the Ninth Circuit and beyond, the SIA urges this Court to issue a writ

of *certiorari* to review the Ninth Circuit's decision and resolve the troubling inconsistencies and the practical problems that implementation of that this decision has raised.

III. ARGUMENT

I. BECAUSE THE NINTH CIRCUIT'S DECISION CONFLICTS WITH *GILMER*, FURTHER GUIDANCE FROM THIS COURT IS NEEDED.

In 1991, this Court laid to rest the question of whether agreements to arbitrate, required as a condition of employment, were enforceable against statutory employment claims. *Gilmer*, 500 U.S. 20. Because the Ninth Circuit's opinion fails to follow *Gilmer*, a writ of *certiorari* should issue to review that decision.

A. *Gilmer* Unequivocally Enforced Agreements to Arbitrate Statutory Discrimination Claims.

Like Gilmer, Respondent Tonyja Duffield was required by her employer as a condition of employment to register with the New York Stock Exchange, Inc. ("NYSE"). By signing the "Uniform Application for Securities Industry

Registration or Transfer" ("Form U-4"), both Duffield and Gilmer "agree[d] to arbitrate any dispute claim or controversy" arising between the employee and his or her employer "that is required to be arbitrated under the rules, constitutions or by-laws of the organizations with which I register." *See Duffield*, 144 F.3d at 1185. Under the NYSE rules, "[a]ny controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative" must be arbitrated. NYSE Rules of Arbitration, R. 347.

Following the termination of his employment, Gilmer brought suit against his former employer in court for age discrimination in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.* *Gilmer*, 500 U.S. at 24. Despite his arbitration agreement, Gilmer argued that he should not be compelled to arbitrate his claim because arbitration was inconsistent with the

purpose of the ADEA. *Id.* at 27. In rejecting Gilmer's argument, this Court found that, notwithstanding the "important social policies of the ADEA, there was no "inherent inconsistency between those policies . . . and enforcing agreements to arbitrate age discrimination claims." *Id.* Although *Gilmer*'s language was unequivocal and this Court viewed the law of arbitration at that time it decided *Gilmer* to be clear, *id.* at 26 ("It is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA."), *Duffield* conflicts squarely with *Gilmer*.

B. The Ninth Circuit's Strained Construction of the 1991 Civil Rights Act Conflicts with *Gilmer*.

In an attempt to side-step *Gilmer*'s clear holding that mandatory, pre-dispute arbitration agreements may be enforced against statutory discrimination claims, the Ninth Circuit held that the text and legislative history of Section 118 of the 1991 Civil Rights Act, Pub. L. 102-166,

reprinted in notes to 42 U.S.C. § 1981, "evinced [Congress's] intention to preclude a waiver of judicial remedies for the statutory rights at issue." [3] *Duffield*, 144 F.3d at 1189 (quoting *Gilmer*, 500 U.S. at 26. Notwithstanding the fact that this Court decided *Gilmer* some six months prior to the passage of the 1991 Civil Rights Act,[4] the Ninth Circuit erroneously concluded that Congress intended to freeze its pre-*Gilmer* perception of the law that, according to the Ninth Circuit, "precluded Title VII cases from being subjected to compulsory arbitration." *Id.* at 1188 (quoting *Nghiem v. NEC Elec., Inc.*, 25 F.3d 1437, 1441 (9th Cir. 1994)). This

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[3] Section 118 states:

> Where appropriate and to the extent authorized by law, the use of alternative dispute resolution including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.

Pub. L. 102-166, *reprinted in* notes to 42 U.S.C. § 1981.

[4] The Ninth Circuit erroneously stated that this Court's issuance of *Gilmer* was "almost simultaneous[]" with the passage of the 1991 Civil Rights Act. In fact, *Gilmer* was decided on May 13, 1991, and the 1991 Civil Rights Act was passed on November 7, 1991.

assertion is counter to the well-established rule of legislative construction that Congress is presumed to know and to adopt judicial interpretations of law existing at the time it enacts legislation. *See Faragher v. City of Boca Raton*, ___ U.S. ___, 118 S.Ct. 2275, 1998 WL 336322 at * 11 (June 26, 1998) (presuming that Congress adopted judicial interpretations related to subject matter of 1991 Civil Rights Act unless Congress expressly modified those holdings). The Ninth Circuit's logic is nothing more than a thinly disguised end-run around this Court's holding in *Gilmer*: that mandatory, pre-dispute arbitration agreements may be enforced as to statutory discrimination claims.

The *Duffield* court's strained construction of the text of Section 118 further evidences *Duffield*'s conflict with *Gilmer*. According to the Ninth Circuit, Section 118's phrase "[w]here appropriate," means only when plaintiffs choose to go to arbitration, not when arbitration is "forc[ed] . . . upon them." *Duffield*, 144 F.3d at 1194. Thus, the Ninth

Circuit concluded, Congress only intended to "encourage[]" post-dispute agreements to arbitrate. *Id.* This plainly contradicts *Gilmer*'s earlier holding that a pre-dispute arbitration agreement, entered into as a condition of employment, was enforceable.[5]

II. THE SPLIT IN THE CIRCUITS IS UNTENABLE FOR EMPLOYERS AND EMPLOYEES RESOLVING DISPUTES.

The Ninth Circuit's *Duffield* decision presents a split in the circuits that the SIA urges this Court to resolve.

A. The Ninth Circuit's Duffield Decision Conflicts with Every Other Circuit That Has Considered the Issue.

Every other circuit court that has addressed this issue has disagreed with the Ninth Circuit's holding that the 1991 Civil Rights Act precludes mandatory, pre-dispute

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[5] The fact that Gilmer asserted an ADEA claim and Duffield asserts a claim under Title VII cannot be a basis for the Ninth Circuit's refusal to follow *Gilmer* since the ADEA and Title VII are similar statutory schemes. *See, e.g., Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979); *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932, 935 (9th Cir. 1992).

agreements to arbitrate statutory discrimination claims.

For example, in *Cole v. Burns Inter. Sec. Svces.*, 105 F.3d 1465, 1472-73 (D.C. Cir. 1997), the District of Columbia Circuit enforced a mandatory, pre-dispute agreement to arbitrate Title VII claims. The *Cole* court held that *Gilmer* required enforcement of arbitration agreements signed "as a condition of employment, to forego all access to jury trials and . . . to use arbitration in place of judicial for a for the resolution of statutory as well as contractual claims." The Eighth Circuit agreed that "the arbitrability of Title VII claims finds support in the Civil Rights Act of 1991." *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 837 (8th Cir. 1997). Similarly, in *Matthews v. Rollins Hudig Hall Co.*, 72 F.3d 50, 54 n.4 (7th Cir. 1995), the Seventh Circuit compelled an employee to arbitrate his ADEA claims pursuant to a mandatory, pre-dispute arbitration agreement, stating that "the Civil Rights Act of 1991 encourages the use of arbitration to resolve ADEA claims." *See also Austin v.*

Owens-Brockway Glass Container, Inc., 78 F.3d 875, 881 (4th Cir.), *cert. denied*, ___ U.S. ___, 117 S.Ct. 432 (1996) ("The language of [Section 118] could not be any more clear in showing Congressional favor towards arbitration.").

Finally, in two cases decided after *Duffield*, the Third Circuit and the Fifth Circuit compelled to arbitration employees' statutory claims pursuant to agreements to arbitrate contained in the employees' Form U-4. *Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175 (3rd Cir. 1998); *Mouton v. Metropolitan Life Ins. Co.*, ___ F.3d ___, 1998 WL 396827 (5th Cir. July 31, 1998). The *Seus* court sharply criticized the Ninth Circuit's analysis of the text and legislative history of Section 118, stating, "On its face, the text of § 118 evinces a clear Congressional intent to encourage arbitration of Title VII and ADEA claims, not to preclude such arbitration." *Id.* at 182. Noting *Duffield*'s conflict with *Gilmer*, the Third Circuit declared, "Finally, even if we were to accept 'authorized by law' as intended to

codify case law, we would find the text incompatible with the notion that the law codified was case law inconsistent with a Supreme Court case decided six months before the passage of the Act [referring to *Gilmer*]." *Id.* at 183. Similarly, the Fifth Circuit disagreed with *Duffield* in *Mouton,* 1998 WL 396827 at *2, n.4, holding that Title VII claims arising after the 1991 Civil Rights Act were arbitrable.

B. Because a Conflict in the Circuits Results in Inconsistent Employment Policies and Hampers the Quick and Efficient Resolution of Employment Disputes, a Writ of *Certiorari* Should Issue.

The conflict in the circuits caused by the *Duffield* decision will have an immediate and profound impact on the relationship between employers and employees. In the securities industry alone, some 32% of the employees of the largest 50 securities firms in the United States have agreed to arbitrate all claims arising out of their employment by virtue of signing a Form U-4. U.S. General Accounting Office, *Employment Discrimination: How*

Registered Representatives Fare in Discrimination Disputes, GAO/HEHS-94-17 at 3 (1994). Many of those firms require non-registered employees to sign individual arbitration agreements as a condition of employment. However, while this case arose in the context of the securities industry, the Ninth Circuit's sweeping opinion affects all employers who require employees, as a condition of employment, to agree to arbitrate their employment-related claims.

Since this Court's 1991 *Gilmer* decision, more and more employers have implemented arbitration programs. A 1994 General Accounting Office ("GAO") survey of private employers found that approximately 10% of employers utilize arbitration to resolve employment disputes. U.S. General Accounting Office, *Employment Discrimination: Most Private-Sector Employers Use Alternative Dispute Resolution*, GAO/HEHS-95-150 at 7 (1995). By 1997, the GAO estimated that the figure had almost doubled to 19%. U.S. General Accounting Office,

Alternative Dispute Resolution: Employers' Experiences with ADR in the Workplace, GAO/GGD-97-157 at 2 (1997) ("*ADR in the Workplace*"). Further, employers report that they adopted arbitration as a means of coping with problems inherent in litigating employment disputes – time, cost and frustration. *Id.* at 7-8. Therefore, unless this Court issues a writ of *certiorari* to review the *Duffield* decision, employers and employees in the Ninth Circuit will remain unable to reap the benefits produced by arbitration, including reduced legal fees, shorter time to final resolution of disputes and the ability to resolve disputes while repairing or maintaining employment relationships. *Id.*

Further, *Duffield*'s broad rejection of arbitration of statutory employment disputes will dramatically increase the number of these claims that are brought in court. This will further burden a court system currently facing a crushing caseload of employment claims. For example, the Administrative Office of the United States

Courts estimates that the number of employment cases filed annual in the federal courts increased approximately 55% from 1992 to 1997. Administrative Office of the United States, *Judicial Business of the United States Courts 1997* at Table C-2. In the Second Circuit alone, employment discrimination matters comprise 10% of the total caseload. Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts, *Preliminary Draft Report of the Second Circuit Task Force on Gender, Racial, and Ethnic Fairness in the Courts* n.82 (1997). To force all such claims into litigation is a waste of judicial resources.

Unfortunately, the Ninth Circuit's decision doesn't just affect local and regional employers. Employers with multistate operations are likely to be the hardest hit. In the securities industry alone, more than 100 firms with offices within the Ninth Circuit also have offices within other circuits. *See Standard & Poor's Security Dealers of North America* (1998). Some of the largest firms have offices in

virtually every state. These firms, like other national employers, are faced with the dilemma of dismantling a system of dispute resolution that is cost-effective and efficient for employers and employees alike, or exempting those individuals who are employed within the Ninth Circuit. Neither alternative is appealing since, as the GAO's survey of alternative dispute resolution systems shows, most private-sector employers implement arbitration programs organizationwide. *ADR in the Workplace* at 2. Indeed, at least one scholar has posited that employers will only benefit from arbitration systems when *all* claims are required to be arbitrated – and that requires a system of mandatory, pre-dispute arbitration. Theodore J. St. Antoine, *Mandatory Arbitration of Employee Discrimination Claims: Unmitigated Evil or Blessing in Disguise?* 15 Thomas M. Cooley L. Rev. 1, 8 (1998). *See also* Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims* 72 N.Y.U. L. Rev. 1344, 1349 (1997) ("[Pre-dispute

arbitration] is an alternative that offers the promise of a less expensive, more expeditious, less draining and divisive process, and yet still effective remedy.").

Finally, both local and regional employers as well as national employers will suffer from *Duffield*'s effect on cases involving multiple claims. According to the Ninth Circuit, neither Title VII claims nor claims arising out of state anti-discrimination statutes may be subject to arbitration. *Duffield*, 144 F.3d at 1203. However, it is the rare case that only posits one theory of relief. Indeed, Duffield herself asserted state tort and contract claims that are subject to arbitration and Title VII and state anti-discrimination claims, which the Ninth Circuit deemed non-arbitrable. This means that employers and employees frequently will litigate employment claims in separate fora, even though those claims are based on the same set of factual circumstances – resulting in a waste of judicial resources.

IV. CONCLUSION

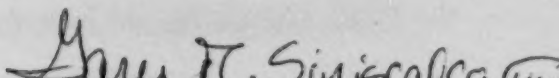
Abraham Lincoln is oft quoted as saying, "Discourage litigation . . . the nominal winner is often a real loser in fees, in expenses, and waste of time." Nonetheless, the Ninth Circuit has eschewed decisions of this Court and decisions of the other circuit courts of appeal to mandate that employers and employees resolve their statutory employment disputes through litigation. Because the *Duffield* decision has cast doubt on the continuing viability of *Gilmer* and has created an untenable dual-track for resolution of employment disputes, *amicus curiae* the Securities Industry Association

urges this Court to issue a writ of *certiorari* to review the decision below.

October 6, 1998

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1998

ROBERTSON, STEPHENS & COMPANY,

Petitioner,

vs.

TONYJA DUFFIELD,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

		Page
I.	THE CONFLICT AMONG THE CIRCUITS AND OTHER STATE AND FEDERAL COURTS IS SOLIDIFYING, NOT RESOLVING	2
II.	THE DECISION BELOW AFFECTS EVERY SECTOR OF THE ECONOMY, NOT JUST THE SECURITIES INDUSTRY.	5
III.	THIS CASE WILL NOT BE MOOTED EVEN IF THE PROPOSED NYSE RULE CHANGE IS ADOPTED.	7
CONCLUSION		9

TABLE OF CITED AUTHORITIES

Cases:

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) 6

Kuehner v. Dickinson & Co., 84 F.3d 316 (9th Cir. 1996) 7

Mouton v. Metropolitan Life Insurance Co., 147 F.3d 453 (5th Cir. 1998) 3, 4

O'Hara v. Mt. Vernon Bd. of Educ., __ F. Supp. 2d __, No. C2-95-554, 1998 WL 547068 (S.D. Ohio Aug. 26, 1998) 3

Table of Cited Authorities

	Page
Seus v. John Nuveen & Co., 146 F.3d 175 (3d Cir. 1998)	2, 3
Thomas v. Bear, Stearns & Co., Inc., No. CIV. A.3:93-CV-1970D, 1998 WL 684232 (N.D. Tex. Sept. 25, 1998)	3
24 Hour Fitness, Inc. v. Superior Court, 66 Cal. App. 4th 1199, 78 Cal. Rptr. 2d 533 (Sept. 28, 1998)	4
Wright v. Universal Maritime Services Corp., No. 97-889 (argued Oct. 7, 1998)	1, 4, 8
Statute:	
29 U.S.C. §§ 141 *et seq.*	4
Rules:	
NYSE Rule 347	7
NYSE Rule 603	7
Supreme Court Rule 14.1(a)	6
Other Authority:	
J. Ward, "9th Circuit Guts Mandatory ADR," *The Recorder* at 1 (May 11, 1998)	6

Petitioner Robertson, Stephens & Company ("Robertson, Stephens") respectfully submits that respondent Tonyja Duffield ("Duffield") has not raised in her opposition brief a single valid reason for denying the writ of *certiorari*. Duffield cannot deny the importance of the question raised in the petition: whether employers and individual employees may enter into enforceable agreements to arbitrate Title VII and related state statutory claims as a condition of employment. Duffield does not dispute that a square conflict among the circuits exists, but merely quibbles as to the extent of the conflict. She also speculates that the question presented in this petition may be answered by the Court's decision in the pending case of *Wright v. Universal Maritime Services Corp.*, No. 97-889 (argued Oct. 7, 1998), which involves arbitration of a statutory discrimination claim under a collective bargaining agreement not governed by the Federal Arbitration Act ("FAA"). As the briefs and recent oral argument in that case reveal, however, the *Wright* case does not provide the proper opportunity for the Court to decide whether, under the FAA, Section 118 of the Civil Rights Act of 1991, which encourages arbitration, actually evinces congressional intent to preclude arbitration of statutory discrimination claims pursuant to individual agreements entered into as a condition of employment. The instant petition directly presents this important question.

Duffield's remaining points are mere smoke intended to give the appearance of a case turning on special or unique circumstances. Duffield's challenges to the adequacy of the arbitration forum, which were not addressed by the Ninth Circuit (but which were rejected by the district court), simply do not weigh among the considerations affecting the granting of the writ. Nor would this case — which has already been ordered to arbitration by both the district court

and the Ninth Circuit — be mooted by any subsequent change in the arbitration rules of the New York Stock Exchange ("NYSE") or the National Association of Securities Dealers ("NASD"). For the reasons set forth below and in the petition, the writ should be granted.

I.

THE CONFLICT AMONG THE CIRCUITS AND OTHER STATE AND FEDERAL COURTS IS SOLIDIFYING, NOT RESOLVING.

Duffield concedes, as she must, a square conflict among the circuit courts as to the arbitrability of Title VII claims pursuant to individual agreements entered into as a condition of employment.[1] Duffield's assertion that the conflict "may well resolve itself" has no basis in logic or fact. If anything, the split has become more entrenched since Robertson, Stephens filed its petition. Duffield acknowledges a square conflict between the decision below and the decision of the Third Circuit in *Seus v. John Nuveen & Co.*, 146 F.3d 175 (3d Cir. 1998). Duffield contends, however, that only *Seus* is in conflict because only *Seus* addressed the issue of the interpretation of Section 118 of the Civil Rights Act of 1991, which "encouraged" arbitration of Title VII claims. Opp. Brief at 21 n.14. In fact, Robertson, Stephens's petition cited, in addition to *Seus*, decisions from the Fourth,

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1. Duffield's opposition does not even address the issue of the arbitrability of state statutory discrimination claims. The decision below found that Congress intended to prohibit arbitration of both federal and state statutory discrimination claims. The Ninth Circuit's treatment of the state law claims is as significant a burden on arbitration under the FAA as the ruling regarding Title VII claims. *See* Pet. at 28.

Seventh, and Eighth circuits, two state high court decisions, and one district court decision — all of which analyzed Section 118 and reached conclusions contrary to the decision of the Ninth Circuit. *See* Pet. at 10-11 & n.4. Moreover, the conflict is equally problematic with regard to decisions of the District of Columbia and Fifth circuits, which, while not specifically discussing Section 118, did enforce agreements to arbitrate Title VII claims arising after the 1991 Civil Rights Act. *See id.*

Duffield cannot persuasively support the contention that more litigation in other circuits would aid this Court's resolution of the question presented in the petition. The litigants and courts in the decision below, in *Seus* and in the other cases cited in the petition, have already identified all of the statutory language, legislative history, and key arguments at issue. Further percolation of this issue in the circuit courts would not materially assist this Court in interpreting Section 118 and assessing its impact, if any, on the enforceability under the FAA of arbitration agreements entered into as a condition of employment.

In the meantime, federal and state courts continue to issue cases which conflict with the decision below. Since the petition was filed, a federal court in Ohio observed that the conflict among the circuits regarding Section 118 "continues unabated." *O'Hara v. Mt. Vernon Bd. of Educ.*, __ F. Supp. 2d __, No. C2-95-554, 1998 WL 547068 (S.D. Ohio Aug. 26, 1998). A Texas federal court rejected a challenge to a Title VII arbitration award in a case in which the plaintiff relied on the Ninth Circuit decision in *Duffield*. *See Thomas v. Bear, Stearns & Co., Inc.*, No. CIV. A.3:93-CV-1970D, 1998 WL 684232 (N.D. Tex. Sept. 25, 1998). The district court in *Thomas* based its ruling on the Fifth Circuit's recent decision in *Mouton v. Metropolitan Life*

Insurance Co., 147 F.3d 453 (5th Cir. 1998), one of the cases which Duffield erroneously dismisses as a false conflict. In the state system, a California appellate court held that state discrimination claims are arbitrable and expressly rejected the Ninth Circuit's decision below. *See 24 Hour Fitness, Inc. v. Superior Court*, 66 Cal. App. 4th 1199, 78 Cal. Rptr. 2d 533 (Sept. 28, 1998).[2] In both the federal and state courts, the conflict shows no sign that it will somehow resolve itself without the intervention of this Court.

Duffield's contention that the question raised here – the enforceability of individual agreements to arbitrate Title VII claims — may be resolved when this Court decides *Wright v. Universal Maritime Services Corp.*, No. 97-889 (argued Oct. 7, 1998), is far-fetched. Unlike the individual agreement to arbitrate under the FAA in this case, *Wright* involves arbitration under a collective bargaining agreement governed by the Labor Management Relations Act, 29 U.S.C. §§ 141 *et seq*. The question under the FAA of the arbitrability of Title VII and related state statutory claims arising after the Civil Rights Act of 1991 pursuant to individual arbitration agreements entered into as a condition of employment cannot be decided based on the facts of *Wright*.

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2. The split between California and Ninth Circuit decisions on the arbitrability of statutory discrimination claims is troubling because it promotes forum shopping and the filing of state claims in already congested federal courts within the Ninth Circuit.

II.

THE DECISION BELOW AFFECTS EVERY SECTOR OF THE ECONOMY, NOT JUST THE SECURITIES INDUSTRY.

Contrary to Duffield's assertions in her opposition brief, the holding below is not limited to the securities industry. The court below stated that the legislative history of Section 118

> makes it clear that there is no need to hypothesize over whether Congress intended to include *Gilmer* within its definition of what [arbitration] was "authorized by law." It is evident from the legislative history that the answer to that inquiry is a resounding "no." Congress in no way intended to incorporate *Gilmer*'s holding into Title VII, or to authorize compulsory arbitration of Title VII claims. In fact, its clearly expressed intent was precisely the opposite.

Pet. App. at 35a. In applying its interpretation of Section 118 to Duffield's arbitration agreement, the Ninth Circuit stated the rule broadly:

> Form U-4 compels precisely what Congress intended to prohibit in the 1991 Act: mandatory requirements under which prospective employees agree as a condition of employment to surrender their rights to litigate future Title VII claims in a judicial forum and accept arbitration instead.

Id. at 46a.

Duffield's own attorneys, on other occasions, have trumpeted the broad effect of the Ninth Circuit's ruling. Michael Rubin, counsel of record for Duffield, told a San Francisco legal newspaper:

> This strikes down arbitration not just in the securities industry, but in every single workplace in America.

J. Ward, "9th Circuit Guts Mandatory ADR," *The Recorder* at 1 (May 11, 1998).

Duffield suggests that the "unique" context of securities industry arbitration would prevent the court from reaching the question decided below. Opp. at 10. This Court need not address the specific challenges to securities industry arbitration which the Ninth Circuit did not reach below and which are not the subject of a circuit split. This Court's *certiorari* process is expressly designed to limit the questions considered by the Court. Rule 14.1(a) of this Court. Thus, this Court is free to reverse the Ninth Circuit by answering the question presented, and remand for consideration below Duffield's arguments that relate solely to securities industry arbitration. The last time this Court addressed individual agreements to arbitrate discrimination claims, it did so in the context of NYSE arbitration. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (NYSE arbitration procedures provide fair and adequate forum for the resolution of statutory discrimination claim). The Court could effectively do so again in this case.

III.

THIS CASE WILL NOT BE MOOTED EVEN IF THE PROPOSED NYSE RULE CHANGE IS ADOPTED.

Duffield argues that the proposed change to NYSE Rule 347 will moot this case by preventing an NYSE arbitration from going forward. Even if the rule change were to become effective (which has not so far occurred), this argument fails for several reasons. First, contrary to Duffield's suggestion, the rule change would not apply to pending cases already filed in court and ordered to arbitration under the present rule.[3] *See, e.g., Kuehner v. Dickinson & Co.*, 84 F.3d 316, 320 (9th Cir. 1996) (applying the arbitration rule in effect at the time the lawsuit was filed); *see also* NYSE Rule 603 (time limitation for initiating arbitration does not apply to any case directed to arbitration by a court of competent jurisdiction).

Second, under the existing Rule 347, Robertson, Stephens has the ability to initiate an arbitration proceeding, and would do so if necessary to preserve the arbitral forum for all of Duffield's claims. *See* NYSE Rule 347 (any employment-related controversy between a registered representative and member of the NYSE "shall be settled by arbitration, *at the instance of any such party*" (emphasis added)). Even under Duffield's erroneous interpretation, she must concede that once the arbitration is initiated, it would not be affected by the subsequent proposed change to Rule 347.

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3. The district court ordered arbitration of all of Duffield's claims, including Title VII and state Fair Employment and Housing Act claims. Pet. App. at 87a. The Ninth Circuit affirmed the order compelling arbitration *except* as to Title VII and FEHA claims. *Id.* at 56a.

Finally, this case will not become moot regardless of the availability of the NYSE forum for statutory discrimination claims. Duffield agreed to arbitrate her employment claims under the arbitration rules of the NASD. She also separately agreed in writing to arbitrate under the Robertson, Stephens arbitration procedures all disputes "arising out of or relating to the termination of any employee's employment . . . including . . . alleged violations of federal, state and/or local statutes." (CR 78, SER 604-05). These separate arbitration agreements were alternative bases for Robertson, Stephens' motion to compel arbitration and stay litigation and its opposition to Duffield's motion for partial summary judgment on her claim that she was not required to arbitrate her employment dispute with Robertson, Stephens.[4]

In summary, each of Duffield's arguments against granting the writ of *certiorari* collapses upon examination. Contrary to her contentions, the pending *Wright* case and potential changes in securities industry arbitration cannot affect the Court's ability to resolve the question presented if *certiorari* is granted. Duffield concedes that this is an important issue on which there is a square conflict among the circuit courts. As revealed by her counsel's own candid comments elsewhere, the decision below affects arbitration in "every single workplace in America." The conflict on this important issue is not tolerable and will not be resolved absent intervention of this Court.

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4. During her career, Duffield has signed at least five separate agreements to arbitrate employment claims. *See* Pet. at 3-4. In the Form U-4 she signed at the commencement of her employment with Robertson, Stephens, she agreed to arbitrate employment claims under the rules of the NYSE, NASD, and the American Stock Exchange ("ASE"). (CR 33, ER Tab G). Unlike the NYSE and the NASD, the ASE has not proposed to modify its arbitration rules.

CONCLUSION

For the reasons set forth above and in the petition, the Court should issue the writ of *certiorari*.

Respectfully submitted,

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October 19, 1998

(8)

No. 98-237

FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ROBERTSON, STEPHENS & COMPANY,
Petitioner,

v.

TONYJA DUFFIELD,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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SUPPLEMENTAL BRIEF IN OPPOSITION RE MOOTNESS

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SUPPLEMENTAL BRIEF IN OPPOSITION RE MOOTNESS

Pursuant to Supreme Court Rule 15.8, plaintiff/respondent Tonyja Duffield submits this supplemental brief in opposition to certiorari to cite new matter demonstrating why the SEC's anticipated approval of the NYSE's proposed rule change will moot the Question Presented in this case. *See* Notice of Filing of Proposed Rule Changes by the New York Stock Exchange, Inc. Relating To Arbitration Rules, SEC Release No. 34-40479, File No. SR-NYSE-98-28, 63 Fed. Reg. 52782 (Oct. 1, 1998) ("Comments") (attached hereto as Appendix SA-1).[1]

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[1] This Notice was published in the Federal Register after plaintiff-respondent Duffield sent her Brief in Opposition to the printer, and she did not become aware of the publication until after that brief was filed with the Court. *See* Sup. Ct. Rule 15.8.

Robertson Stephens contends that the NYSE's proposal to eliminate mandatory arbitration would not moot the parties' dispute (despite the anticipated SEC approval), because "the rule change would not apply to pending cases already filed in court and ordered to arbitration under the present rules." Reply Brief at 7. However, the proposed rules, attached as Appendix A to Ms. Duffield's Brief in Opposition, say no such thing, and the Comments to those rules submitted by the NYSE to the SEC (Appendix SA-1) confirm that Robertson Stephens' assertion is incorrect. *See* Comments, 63 Fed. Reg. 52782, 52783, SA-6-8 (stating, without exception: "The Exchange's proposed amendments will limit the availability of the Exchange's forum for the resolution of employment discrimination claims to those cases where the parties have agreed to arbitrate the claim after it has arisen, as recommended by the EEOC").

The NYSE's Comments on its proposed rules confirm that those rules will cover *all* cases pending in court that raise statutory employment discrimination claims, since the rules state that, upon SEC approval, the NYSE will immediately prohibit the use of its resources for arbitration of such claims unless the parties have agreed to arbitrate *after* the dispute arose. Under the rules, such claims are not "eligible for arbitration." *See* Proposed NYSE Rule 347(b).

Moreover, even if Robertson Stephens' construction of the proposed rules were correct, plaintiff's Title VII and FEHA discrimination claims in this case have *not* been ordered to arbitration. Rather, the Ninth Circuit held that those claims *could* be litigated in court, and it *reversed* the district court order compelling arbitration. Consequently, even under Robertson Stephens' reading of the NYSE's proposed rules, the parties' dispute over arbitrability *will* become moot upon SEC approval of those rules, since there is no pending order to arbitrate plaintiff's discrimination claims.

Robertson Stephens also argues that it could avoid mootness by initiating arbitration *before* the SEC approves the NYSE rule change, thus "preserv[ing] the arbitral forum for all of Duffield's claims." Reply Brief at 7. However, even if the existing NYSE rules permitted such a preemptive demand for arbitration—and no such rule is cited by Robertson Stephens—the fact remains that Robertson Stephens has *not* initiated such an arbitration proceeding (nor could it, under the current state of Ninth Circuit law). Moreover, Robertson Stephens' underlying assumption is again faulty, because nothing in the proposed NYSE rules or in the attached Comments explaining those rules exempts cases in which a party has, as Robertson Stephens proposes, simply filed a piece of paper to "initiate" arbitration.

Finally, Robertson Stephens attempts to avoid the mooting impact of the proposed NYSE rule changes by arguing that even if the NYSE forum were no longer available, it could still seek arbitration under its own private arbitration agreement. Reply Brief at 8 & n.8. However, that arbitration provision by its terms does not apply to securities traders like Ms. Duffield who are bound through signing a Form U-4 to the arbitration provisions imposed by the exchanges with which the traders registered. *See* CR 78 at 32, SER 604. And, even if Robertson Stephens' internal arbitration agreement applied to plaintiff, it would not encompass plaintiff's Title VII claims challenging defendant's hostile and discriminatory work environment, because the internal procedure applies only to disputes "arising out [of] or relating to the *termination* of any employee's employment with Robertson Stephens." *Id.* (emphasis added).[2]

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[2] Although Robertson Stephens also suggests that it could require arbitration under the NASD or American Stock Exchange ("ASE") rules, it ignores plaintiff's showing that it sought to compel arbitration in this case *only* under the NYSE rules, thereby waiving any right to compel arbitration for some other reason in some other

For these reasons, and the reasons stated in the Brief in Opposition, Robertson Stephens' Petition for Certiorari should be denied.

Respectfully submitted,

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forum. Brief in Opposition at 6, 9 n.5. Robertson Stephens also ignores plaintiff's showing that the NASD forum will in any event *not* be available, because the SEC has already approved the NASD's proposed arbitration rule change effective January 1, 1999. *Id.* at 9 n.5; *see also id.* at 6 n.3 (citing Seventh and Ninth Circuit cases providing alternative grounds why NASD rules in effect when plaintiff signed her Form U-4 did not encompass Title VII claims).

Never before in this case has Robertson Stephens referred to ASE's arbitration rules, let alone claimed that they require arbitration of Ms. Duffield's claims. In fact, even if the current version of those rules applied to Ms. Duffield (which they do not, *see* ASE Arbitration Rule 600), the ASE announced on June 25, 1998 that it would be merging into the NASD by the end of the year, thereafter operating as a separate subsidiary of the NASD, whose arbitration rules would presumably be controlling. *See* Press Release, *AMEX Membership Overwhelmingly Approves NASD/AMEX Merger*, http://www.amex.com/floor/AmexNews/General/mergermembers.htm.

APPENDIX

APPENDIX

SUPPLEMENTAL APPENDIX

FEDERAL REGISTER
Vol. 63, No. 190

Notices

SECURITIES AND EXCHANGE COMMISSION (SEC)

[Release No. 34-40479; File No. SR-NYSE-98-28]

Self Regulatory Organizations; Notice of Filing of Proposed Rule Changes by the New York Stock Exchange, Inc. Relating to Arbitration Rules

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DATE: Thursday, October 1, 1998

September 24, 1998.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act")[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on September 15, 1998 the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission" or "SEC") the proposed rule changes as described in Item I, II and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule changes from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Changes

The proposed amendments to NYSE Rules 347 and 600 will exclude claims of employment discrimination,

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b-4.

including sexual harassment, in violation of a statute from arbitration unless the parties have agreed to arbitrate the claim after it has arisen. The text of the proposed rule changes are as follows (additions are italicized, deletions are bracketed.)

* * * * *

NYSE Rule 347. Controversies As to Employment or Termination of Employment

(a) Except as provided in paragraph (b), [A]any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules.

(b) Any claim alleging employment discrimination, including any sexual harassment claim, in violation of a statute shall be eligible for submission to arbitration only where the parties have agreed to arbitrate the claim after it has arisen.

NYSE Rule 600. Arbitration

(f) Any claim alleging employment discrimination, including any sexual harassment claim, in violation of a statute shall be eligible for submission to arbitration under these Rules only where the parties have agreed to arbitrate the claim after it has arisen.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Changes

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the

proposed rule changes. The text of these statements may be examined at the places specified in Item IV below and is set forth in Sections A, B, and C below.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Changes

1. Purpose

The purpose of the proposed rule changes is to:

• Exclude any claim alleging employment discrimination, including any sexual harassment claim, in violation of a statute from the requirement that all employment disputes between a registered representative and a member or member organization be arbitrated, except where the parties agree to arbitrate the claim after it has arisen. (NYSE Rule 347)

• Provide that any claim alleging employing discrimination, including any sexual harassment claim, in violation of a statute shall be eligible for submission to arbitration only where the parties have agreed to arbitrate the claim after it has arisen. (NYSE Rule 600)

Background

NYSE Rule 347 has been in effect since the late 1950's, and requires that any employment-related disputes between a registered representative and a member or member organization be settled by arbitration.[3] In order to become "registered" an individual is required to sign and

[3] NYSE Rule 347 provides: "Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules."

file with the Exchange a Form U-4 (Uniform Application for Securities Registration or Transfer). Form U-4 requires registered persons to submit to arbitration any claim that is required to be arbitrated under the rules of the self-regulatory organizations with which they register.

Until the 1990's, the rule was generally invoked to arbitrate business and contract disputes, such as wrongful discharge, breach of contract or claims regarding compensation. Beginning with the Supreme Court's decision in *Gilmer v. Interstate Johnson Lane*,[4] claims alleging employment discrimination, including sexual harassment claims, were compelled to arbitration.

In 1994, the General Accounting Office ("GAO") conducted a study on the arbitration of employment discrimination disputes in the securities industry.[5] While the GAO Report did not address the adequacy of arbitration as a means of resolving employment discrimination disputes, it made several recommendations for improving the arbitration process. The recommendation included specialized training of arbitrators in discrimination law and the appointment of more women and minorities as arbitrators.

Despite steps to improve the process, registered representatives and others continue to oppose mandatory arbitration of discrimination claims pursuant to the Form U-4 and other pre-dispute agreements. In July 1997, the U.S. Equal Employment Opportunity Commission ("EEOC") issued a policy statement that mandatory pre-dispute agreements to arbitrate statutory discrimination claims are

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[4] 500 U.S. 20 (1991). In *Gilmer*, the Court held that a registered representative could be compelled to arbitrate his claim under the Age Discrimination in Employment Act ("ADEA") pursuant to Form U-4 and NYSE Rule 347.

[5] Employment Discrimination: How Registered Representatives Fare in Discrimination Disputes (GAO/HEHS-94-17, March 30, 1994).

inconsistent with the purpose of the federal civil right laws.[6]

Two federal court cases decided in 1998 support the EEOC's position. In January 1998, a Massachusetts district court in *Rosenberg v. Merrill Lynch*[7] declined to compel arbitration of plaintiff's Title VII and the ADEA claims pursuant to the agreement to arbitrate contained in the Form U-4 plaintiff was required to sign as a condition of her employment. In May 1998, the Court of Appeals for the Ninth Circuit held, in *Duffield v. Robertson Stephens & Company*,[8] that employers could not compel employees to waive their right to a judicial forum under Title VII, and therefore plaintiff could not be compelled to arbitrate her statutory discrimination claims pursuant to Form U-4. Prior to these decisions, federal courts had consistently upheld the arbitration of employment discrimination claims pursuant to the Form U-4.

On October 17, 1997, the National Association of Securities Dealers, Inc. ("NASD") submitted to the Commission a proposed rule change to remove the requirement from its rules that registered representatives must arbitrate statutory employment discrimination claims.[9] Under the NASD's proposal, an employee could file a claim in court unless he was obligated to arbitrate pursuant to a separate agreement entered into either before or after the dispute arose.

In announcing the approval of the NASD rule amendment, SEC Chairman Arthur Levitt "encourage[d] the other SROs to promptly change their rules to conform

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[6] EEOC Notice No. 915.002, July 10, 1997.

[7] 76 FEP 681 (D. Mass. 1998).

[8] 1998 WL 227469 (9th Cir.).

[9] Exchange Act Release No. 39421 (December 10, 1997), 62 FR 66164 (December 17, 1997).

to those of the NASD." [10] The Commission's order stated that the NASD intends to make changes to its arbitration program to make arbitration more attractive to parties for the resolution of discrimination claims.[11] The NASD previously created a "Working Group" that includes attorneys who represent employees, member firms and neutrals. The group is developing proposals and will be recommending changes to the NASD's arbitration procedures for discrimination cases. A representative of the Exchange is participating as an observer in the Working Group's discussion.

The Exchange is following Chairman Levitt's suggestion by proposing an amendment to NYSE Rule 347. The amendment will create an exception to the NYSE rule that requires arbitration of all employment-related claims of registered representatives. Paragraph (a) of the proposed amendment to NYSE Rule 347 adds language indicating that paragraph (b) contains an exception to the requirement to arbitrate employment disputes. Paragraph (b) provides that "a claim alleging employment discrimination, including any sexual harassment claims, in violation of a statute shall be eligible for arbitration only where the parties have agreed to arbitrate the claim after it has arisen." [12]

In addition, the Exchange is going further by proposing rule amendments under which statutory discrimination claims will not be eligible for arbitration pursuant to any pre-dispute agreement to arbitrate. This action brings the Exchange's arbitration policy into conformity with the EEOC's "Policy Statement on Mandatory Bind-

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[10] SEC News Release 98-61, June 23, 1998.

[11] Exchange Act Release No. 40109 (June 22, 1998), 63 FR 35299 (June 29, 1998).

[12] Claims "in violation of a statute" are not limited to the federal civil rights laws and include all federal, state and local anti-discrimination statutes.

ing Arbitration of Employment Discrimination Disputes as a Condition of Employment." [13]

In its December 1997 comment letter to the SEC regarding the NASD proposal, the EEOC reiterated its position "that pre-dispute arbitration agreements, particularly those that mandate binding arbitration of discrimination claims as a condition of employment, are contrary to the fundamental principles reflected in this nation's employment discrimination laws. We recommend therefore, that the proposed rule be revised to permit arbitration of statutory employment discrimination claims only under post-dispute arbitration agreements." [14]

The Exchange has had a general arbitration provision in its Constitution since 1817. NYSE Rule 600 requires the arbitration of disputes between customers or non-members and members or member organization, pursuant to any written agreement to arbitrate or upon the demand of the customer or non-member.[15] The vast majority of disputes resolved by Exchange arbitration are business disputes arising out of securities transactions with investors, and contractual disputes between members and their employees. Since 1992, the year following the *Gil-*

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[13] EEOC Notice No. 915.002, July 10, 1997.

[14] Letter from Gilbert F. Casellas, Chairman, EEOC, to Jonathan G. Katz, Secretary, SEC, Re: NASD Proposed Rule Change on Arbitration of Employment Discrimination Claims, December 1997.

[15] NYSE Rule 600(a) provides: "Any dispute, claim or controversy between a customer or non-member and a member, allied member, member organization and/or associated person arising in connection with the business of such member, allied member, member organization and/or associated person in connection with his activities as an associated person shall be arbitrated under the Constitution and Rules of the New York Stock Exchange, Inc. as provided by any duly executed and enforceable written agreement or upon the demand of the customer or non-member."

mer decision, the Exchange has received an average of 18 discrimination claims a year.[16]

The Exchange's proposed amendments will limit the availability of the Exchange's forum for the resolution of employment discrimination claims to those cases where the parties have agreed to arbitrate the claim after it has arisen, as recommended by the EEOC.

The Exchange is also proposing to amend NYSE Rule 600, adding paragraph (f) that provides that claims alleging employment discrimination, including any sexual harassment claim, shall be eligible for submission to arbitration only where the parties have agreed to arbitrate the claim after it has arisen. This amendment excludes from Exchange arbitration statutory employment discrimination claims of non-registered employees pursuant to pre-dispute arbitration agreements. (NYSE Rule 347 only applies to "registered" employees).

The EEOC and several members of Congress have endorsed arbitration as an effective means of resolving discrimination claims, provided the parties agree to arbitrate after the claim has arisen. The Exchange's proposed amendment provides a forum for those employees who choose, post-dispute, to resolve their statutory employment discrimination claims through arbitration.

Some employment disputes may contain both contract or tort claims as well as statutory employment discrimination claims. Under amended NYSE Rule 347 (and NYSE Rule 600 for non-registered employees who have executed pre-dispute arbitration agreements) these cases may be bifurcated. The employment discrimination claims will be

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16 Historically, discrimination claims accounted for less than two percent of the total claims filed at the Exchange, except for 1996 (when discrimination claims accounted for two point six percent) and the first six months of 1998 where, due to a steady decline in case filings generally, discrimination claims accounted for three percent of the cases filed.

heard in a forum other than the Exchange, such as court, while any claims subject to arbitration may continue to be heard at the Exchange.[17] However, NYSE Rule 347 requires arbitration of claims "at the instance" of either party, and therefore may be waived, allowing the entire case to be heard in court. The parties may also avoid bifurcation by agreeing to proceed with all claims in a single forum. Given a choice, after a dispute has arisen, employees in many instances may believe that arbitration is preferable to protracted and expensive litigation and will willingly make that choice.[18]

2. Statutory Basis

The proposed changes are consistent with Section 6 (b)(5) of the Exchange Act in that they promote just and equitable principles of trade by insuring that members and member organizations and the public have a fair and impartial forum for the resolution of their disputes.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule changes will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

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[17] The bifurcation of securities industry claims is not unprecedented. Before the Supreme Court's decision in *Shearson v. McMahon*, 482 U.S. 220 (1987) (holding that claims under the Exchange Act could be compelled to arbitration), the Supreme Court decided *Dean Witter Reynolds, Inc. v. Byrd*, 105 S. Ct. 1238 (1985). In *Byrd*, the dispute involved allegations of federal securities laws violations and pendent state law claims. The Court compelled the state law claims to arbitration and held that the federal securities laws claims could be heard in court.

[18] See *Duffield v. Robertson Stephens & Company*, 1998 WL 227469 (9th Cir.).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Changes Received from Members Participants or Others.

The Exchange has neither solicited nor received written comments on the proposed rule changes.

III. Date of Effectiveness of the Proposed Rule Changes and Timing for Commission Action

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

(A) By order approve the proposed rule changes, or

(B) Institute proceedings to determine whether the proposed rule changes should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule changes is consistent with the Exchange Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 5th Street, NW, Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule changes that are filed with the Commission, and all written communications relating to the proposed rule changes between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NYSE. All submissions should refer to

File No. SR-NYSE-98-28 and should be submitted by October 22, 1998.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[19]

Jonathan G. Katz,
Secretary.

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[19] 17 CFR 200.30-3(a)(12).